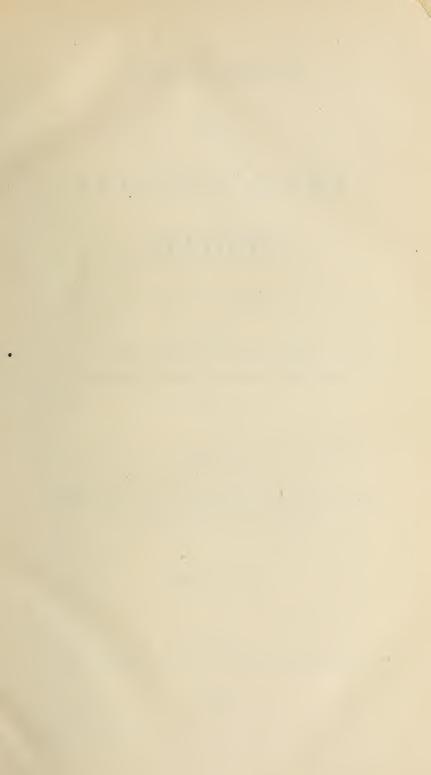




Jour







QUEEN'S BENCH

AND

PRACTICE COURT

REPORTS.

BY

JAMES LUKIN ROBINSON, ESQ., BARRISTER-AT-LAW, AND REPORTER TO THE COURT.

VOL. V.

CONTAINING THE CASES DETERMINED FROM

EASTER TERM, 11 VIC., TO MICHAELMAS TERM 12 VIC., INCLUSIVE,

WITH A TABLE OF THE NAMES OF CASES ARGUED,

AND DIGEST OF THE PRINCIPAL MATTERS.

THIRD EDITION.

TORONTO:

R. CARSWELL, 26 AND 28 ADELAIDE STREET EAST.



JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HON. JOHN BEVERLEY ROBINSON, C. J.

- " JAMES BUCHANAN MACAULAY,
- " ARCHIBALD McLEAN,
- " Jonas Jones,
- " WILLIAM HENRY DRAPER,
- " ROBERT BALDWIN SULLIVAN.

Attorney General:
ROBERT BALDWIN.

Solicitor General:
William Hume Blake.

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REPORTS OF CASES

IN THE

QUEEN'S BENCH AND PRACTICE COURTS.

PRACTICE COURT.

MICHAELMAS TERM, 11 VICTORIA.

Before THE HON. MR. JUSTICE DRAPER.

DOE DEM. WILCOX V. JACOBS.

Where the clerk of assize refused the plaintiff to receive his record, because it had been altered after it had been passed at the Crown Office, by the plaintiff's adding a similiter to the defendant's plea, and entering in the margin the venire facias: Held, per Cur., on an application by the defendant for judgment as in case of a nousuit, that the rule for judgment must be made absolute.

This was an application by Cockburn for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice; opposed by Read on the ground, that upon the facts issue was not shewn to be joined.

It appeared that the Nisi Prius record was passed without adding a similiter to the defendant's plea of not guilty, or any entry of a venire; and that on the commission day the plaintiff's attorney added the similiter on the record, and wrote in the margin thereof the usual entry of a venire facias. The clerk of assize, being aware of this, refused to receive the record, because it had been altered after it had been passed, and the cause consequently could not be tried.

DRAPER, J.—I think that after giving notice of trial and passing his record, and offering it with a similiter on it to the clerk of assize, the plaintiff cannot now be permitted to say issue is not joined, and therefore make this rule absolute.

Per Cur.—Rule absolute.

GEDDES V. ROGERS.

A. at the assizes in Toronto, sucs B, as one of the indorsers on two promissory notes, one for x7L, and the other for 7UL. A. recovers on the note for 2TL, but having mislaid the note for 70L, he enters a noile prosequi as to that part of his claim. A. also brings another action in the District Court of the Niagara District against C., the

1.

maker, and D., another of the indorsers, upon the same note for 27l. Held, per Cur., upon a motion to restrain the plaintiff, under the 5 Will. 4, from recovering more than the full costs of one suit—that the act did not apply.

Hagarty obtained a rule nisi, that plaintiff should be restrained from recovering more than the full costs of one suit against the maker and indorsers of the promissory note recovered on in this cause.

The defendant swore that judgment had been recovered against him in this cause as indorser of a promissory note, dated 24th Feb., 1845, and made by George Simpson, for the payment of 29l. 12s. 3½d. to defendant or order, and by him indorsed to Culver & Cameron, and by them to plaintiff, on which judgment execution had issued, and defendant's goods were seized. That besides this action, another had been brought against the maker and the other indorsers, in the District Court for the District of Niagara, on the same promissory note, in which suit also judgment had been recovered, execution issued and goods seized, and that full costs were taxed in both suits. He grounded his motion on the statute 5 Will. IV., ch. 1.

J. Lukin Robinson shewed cause, upon an affidavit shewing that this suit was instituted against defendant, not only on the promissory note for 29l. 12s. $3\frac{1}{2}d$., but also on another promissory note for 76l. 0s. 1d., to which neither Simpson nor Culvert & Cameron were parties; that this second note was actually declared upon, and that owing to an accidental mislaying of the note for 76l., the plaintiff at the trial was obliged to enter a nolle prosequi as to that note and recovered only on the other.

DRAPER, J.—Under these circumstances I am of opinion that the rule should be discharged.

When the plaintiff brought his action he had a right to include all his demands against the defendant in one suit, and having done so and being prevented only from going on with his suit for his whole claim by an accident, which compelled him to enter a nolle prosequi, and subjected him to the payment of costs as to that part of his demand, I do not think this action can be treated as falling within the provisions of the 5 Will. IV., and entitling the defendant to prevail on this application, even if on other grounds it were clear that his rule could be made absolute.

Per Cur.-Rule discharged.

Parke v. Anderson. Parke v. Meade.

The Testatum Act, 8 Vic. ch. 36, now governs the mode of service of papers on defendants or their attornies. 1t has done away with the former mode of service provided by the Rule of Court, Michaelmas Term, 4 Geo. IV.

Read moved to set aside the assessment of damages in this cause. By affidavits filed on both sides it appeared, that a testatum writ issued out of the office of the deputy clerk of the crown at London, directed to the sheriff of the District of Talbot, in which district the defendant was served. The notice endorsed required defendant to appear at London, and defendant duly entered an appearance there by attorney. Defendant's attorney had no known agent residing in the London District, and plaintiff's attorney served the declaration and demand of plea by putting up copies in the office at London, and having signed interlocutory judgment for want

of a plea, served notice of assessment in a similar manner, and assessed damages at the last assizes at London. The defendant's attorney swore he was never served with any paper in the cause, and did not know it was going on till the second day of the assizes. The plaintiff's attorney swore, that on the third or fourth day of the assizes he saw a letter from defendant's attorney addressed to a barrister at London, requesting him to enquire into the state of the cause; that the plaintiff's attorney informed the barrister how it stood, and at his request agreed to stay the assessment till he could write to defendant's attorney and give him an opportunity of putting in a defence; that such letter was written and sent, and must have been received in due course on the fourth or fifth morning of the assizes; that the assessment was put off to near the end of the assizes (the ninth day), when the barrister informed plaintiff's attorney, that defendant's attorney would move to set aside the assessment, but would not attempt to take proceedings at the assizes.

Becher shewed cause, contending that the papers were properly served according to the Rule of Court, Michaelmas Term, 4 Geo. IV. and that the Testatum Act did not alter the mode of service provided by that rule, if the defendant's attorney had no known agent in the district wherein the action was brought, and was not himself resident there. See 8 Vic., ch. 36. 2ndly. That the application was too late, as defendants attorney might have moved during the assizes and before the assessment took place, as he knew it was postponed to give him an opportunity of coming in to defend.—8 B. & C. 421; 2 Dowl. 47, 218, 708; 3 Dowl. 212; 2 U. C. Rep. 378.

3rdly. That the application was informal; it should be to set aside the previous proceedings, and not the assessment of damages.—4 Dowl. 357; 3 D. & Low. 13; 1 Com. Bench R. 636.

4thly. That there was no affidavit of merits, and no notice of intention to move, and therefore this rule, if absolute, should be without costs.

Read, contra: the objection as to delay does not apply, as we do not move against an irregular service, but on the ground that there is no service at all, and defendant could not move before the commission day, as he did not know plaintiff was proceeding. That the statute recognizes no service except on the defendant's attorney at his office, or on his agent at Toronto, and no rule of court can substitute a different mode of service. That the defendant may content himself with moving against the assessment of damages, which is irregular and void, because no notice of it was given, and it is no answer to that to shew preceding steps were equally void. The defect in this proceeding does not depend on the state of former steps in the cause, and no affidavit of merits is necessary where defendant moves in proper time, and he could not move before term against the assessment.

DRAPER, J.—I think the statute prescribes, that papers in suits begun under its authority must be served either on the defendant, or if he has an attorney, on that attorney at his office in the usual mode, or in the option of the plaintiff, on that attorney's agent at Toronto; and that the provision for this latter mode of service, when none is made on the defendant's attorney at his office, excludes the application of the rule of court; that consequently no notice of assessment has been served at all, and therefore the assessment is irregular.

The application to set aside the assessment could not have been made carlier, and therefore the objection as to delay fails; and as to the informality of the application pointed out, I think the cases cited do not apply, inasmuch as the objection to the proceeding moved against is not based on anything irregular in or prior to the interlocutory judgment, in which for the purposes of this application the defendant seems to have acquiesced. Then the plaintiff assessed damages, knowing that the defendant meant to move against his proceeding, and thinking that under the circumstances no affidavit of merits was necessary. I am of opinion that I must make the rule absolute with costs.

Per Cur. - Rule absolute with costs.

QUEEN'S BENCH.

HILARY TERM, 11 VICTORIA.

Present,-THE HON. J. B. ROBINSON, C. J.

- " MR. JUSTICE JONES,
- " MR. JUSTICE MCLEAN.
- " MR, JUSTICE DRAPER.

MR. JUSTICE MACAULAY in the Practice Court.

BYERS V. MOORE.

The 18th clause of the provincial act, 4 & 5 Vic., ch. 100, does not apply to clergy reserves.

Trespass quare clausum fregit—the premises described as lot 23 in concession A. on the Rideau river, in Nepean.

2nd Count, For cutting and taking away wood.

Pleas, 1st. General issue to the whole declaration.

2nd. To the first count, the close not the plaintiff's.

3rd. To the first count, plaintiff not possessed of the close.

4th. To first count liberum tenementum.

5th. To second, denying plaintiff's property in the wood.

The plaintiff had bought lot No. 23 from the government, and on the 16th July, 1846, paid his first instalment on the lot, being a clergy reserve, and obtained the receipt of the crown agent for the district. The land is described in the receipt as lot 23, &c., in accordance with the plan of Mr. Robert Bell, containing 130 acres more or less, "ten of which are reserved for the Rideau Canal"; and it was made a condition, that Byers should pay to Moore the value of one acre's improvements, which Moore had made on the lot.

The evidence upon the trial respecting the boundary was very contradictory; that which would prove the locus in quo to be on the plaintiff's lot 23 seemed the clearest and most satisfactory. Yet there was evidence in support of a line by one McDiarmid, as being that which was consistent with the original survey on the ground, and so entitled to prevail.

Mr. McDonell, the surveyor, recognised the beech tree on which the defendant relied as an original monument, and said it was on the base line, though according to the plaintiff's witnesses the tree is about four acres back from the river, and did not stand on any line that could have been the base line, unless there is a small broken front between concession A. and the Rideau, which was not explained to be the case.

The jury found McDiarmid's line to be the true line. That, according to some evidence, would still leave part of the *lecus in quo* on 23, but that seemed doubtful, at least as to any substantial trespass.

They found 101. damages for the alleged trespass, but for the defendant on all the issues except that on the plea of liberum tenementum.

A. Wilson moved for a new trial on the law and evidence and for misdirection.

J. H. Hagarty shewed cause.

No cases cited.

ROBINSON, C. J., delivered the judgment of the court.

The first question is, whether the plaintiff having no title, nor actual possession of the *locus in quo*, can maintain trespass against any one under the land sale act, 4 & 5 Vic. ch. 100, sec. 18, having paid only his first instalment, and the lot being a clergy reserve, as his certificate from the crown agent shows.

Secondly, whether he can make this use of the statute to maintain an action against this defendant, considering the circumstances of the defendant's previous occupation.

The crown agent's certificate shews that the lot was sold by the government to the plaintiff, as covering the land embraced in Mr. Beli's survey of lot 23, and consequently that the crown, so far as could be done, has assured the *locus in quo* to the plaintiff.

Upon examining the evidence, I consider that the plaintiff entitled himself to succeed upon the first and fourth issues, for he proved that the defendant entered on the lot 23, and that he cut the wood; and the defendant certainly did not sustain his plea of liberum tenementum.

But on the other issues the question is, whether the plaintiff comes under the 18th clause of the 4 & 5 Vic. ch. 109. His having paid but one instalment, I think, is immaterial. The intention of the certificate seems to be, that the purchaser having made the contract, and paid any part of the purchase money, should be admitted into possession of the lot. He ought to be, as he is charged with interest, and there is a condition inserted in the agent's receipt restraining him from disposing of the timber upon the lot, which shows that the design is to allow him to take possession, though not to commit waste, till he has fully entitled himself to his patent.

Then secondly, does the act extend to clergy reserves, or are not they sold under the British Statute? The first act which authorised any clergy reserves to be sold was 7 & 8 Geo. IV. ch. 62. The next is the 3 & 4 Vic. chap. 78, (passed 7th August 1840) which directs the clergy reserves to be sold under regulations to be made by the governor of Canada, with the advice of the executive council, and approved of by the Queen in council. Such regulations were made on 21st October, 1841. It is, in my opinion, under these acts, and the regulations made under them, and always within the controll of the governor and council

and of her Majesty, that the clergy reserves are disposed of, and not under 4 & 5 Vic. ch. 100, afterwards passed, which could not subject to the disposal and controul of the colonial legislature or government, what the imperial act had otherwise provided for, and what must continue subject to the regulations mentioned in the imperial acts. The 4th, 14th, 15th, 22ud, 25th, 26th, 27th, and 32nd clauses of the provincial act shew that its provisions could not have been intended to apply to the clergy reserves, and especially the last, which clearly manifests, that the legislature intended the terms "crown lands" and "public lands" as used in that act to mean other lands than the clergy reserves.

This being so, I am of opinion that the issues on the 2nd and 5th pleas should be found for the defendant, for the land was not the plaintiff's nor the wood upon it, not by virtue of such title as we can recognize with the help of the 18th clause of 4 & 5 Vic. ch. 100, because that statute does not apply to this case, and not by virtue of any actual possession, which might carry with it prima facie the presumption of title, because the actual possession of the locus in quo was in the defendant and not the plaintiff; and the jury so found, and this entitles the defendant to a verdict on the third issue also. On the first and fourth issues the plaintiff was entitled to succeed, and this I take to be the footing on which the verdict at present stands.

Per Cur.—Rule discharged.

TULLY ET AL. V. THE PRINCIPAL OFFICERS OF HER MAJESTY'S ORDNANCE.

The plaintiffs tendered for the construction of a lake wall in front of the barracks above Toronto on the shore of lake Ontario, and their tender being accepted by the Commissariat Officer at Toronto, an agreement was executed between the plaintiffs of the one part, and "Assistant-Commissary-General Thomson, acting on behalf of her "Majesty, her heirs and successors," of the other part; whereby the plaintiffs engaged to execute the work according to their tender, and in conformity with the plans and specifications in the commissariat office, to which all the parties annexed their signatures, "preparatory to their being lodged with the Royal Engineer "Department for the guidance of all concerned." And it was stated in this contract, that the "plaintiffs should be entitled to receive from her Majesty's govern-"ment, for the performance of the said works to the satisfaction of the Royal "Engineer Department, the sum of 2786l. 8s 11d. currency, to be paid to them by "the Ordnance Department by draft on the military chest, payable in bank notes "or specie at the option of the Commissariat Department."

The plaintiffs under this contract, upon the authority of the Provincial Act 7 Vic. ch. 11, sued the principal officers of her Majesty's Ordnance on the common counts for c.rtain extra work. Held, per Cur., that this was an agreement between the plaintiffs and the Commissariat Department, and that therefore the plaintiffs had no right of action under the statute against these defendants.

Quære.—Suppose the contract had been clearly made between the plaintiffs and the Ordnance Department, could the plaintiffs have recovered against the defendants under the 30th clause of the Provincial Act, 7 Vic., ch. 11? Can the Provincial Parliament constitutionally give a right of action against the Board of Ordnance, a military department of the Imperial Government?

Quære.—Does the 30th clause, assuming it to be constitutional, give a right of action against the Ordnance Department upon an implied as well as upon an express contract.

The plaintiffs brought their action of debt on simple contract against

"The Principal Officers of Her Majesty's Ordnance," claiming 15,000% as due to them:

1st. For work done and materials provided by the plaintiffs for the defendants at their request.

2ndly. For goods sold and delivered, &c.

3rdly. Upon an account stated.

4thly. For freight due from the defendants to the plaintiffs, in respect of the carriage of divers goods, merchandise, materials and chattels by the plaintiffs before that time carried and conveyed and delivered by the plaintiffs for the defendants, and at their request, and for the labour of the plaintiffs and their servants in loading, unloading and delivering the same.

5thly. For money paid by the plaintiffs for the use of the defendants. The declaration concluded in the common form, making no reference to any statute.

Plea, general issue.

In their bill of particulars delivered, the plaintiffs claimed 3942*l*. besides interest, of which sum 2280*l*. was claimed for work done to a lake wall, and among other smaller items of charge for labour and materials employed on other works, they claimed 470*l*. for freight of 2430 tons of Kingston stone used in making the wall.

The work had been done by the plaintiffs, upon a contract for the construction of a lake wall in front of the barracks above Toronto on the shore of Lake Toronto, and for constructing a coffer-dam, filter and reservoir for supplying the troops with water from the lake.

What was required to be done was minutely described in specifications signed by Sir Richard Bonnycastle, as Lieutenant-Colonel of the Royal Engineers, which were deposited for reference in the commissariat office. And the plaintiffs, on the 26th of August, 1845, tendered for it at the sum of 2786l. Ss. 11d., being, as they expressed in their tender, "a reduction "on account of the alterations in materials, &c., of 1326l. 4s. 1d. from a "former tender sent in by the plaintiffs for the above service in April "preceding."

Their tender being accepted by the commissariat officer at Toronto, an agreement under seal was executed on 25th of October, 1845, between the plaintiffs of the one part, and Assistant-Commissary-General Thomson "acting on behalf of Her Majesty, her heirs and successors" of the other part, whereby the plaintiffs engaged to execute the work according to their tender, and in conformity with the plans and specifications in the commissariat office, to which all the parties annexed their signatures, "preparatory to their being lodged with the Royal Engineer Department" for the guidance of all concerned." And it was stated in this contract, that the said "John Tully and James Miller would be entitled to receive "from her Majesty's government, for the performance of the said works to "the satisfaction of the Royal Engineer Department, the sum of 27861. 8s. "11d. currency, to be paid to them by the Ordnance Department by "draft on the military chest, payable in bank notes or specie at the option "of the Commissariat Department."

The contract thus executed was transmitted, it appeared, officially by the Assistant-Commissary-General, who had entered into it on behalf of her Majesty, to the commanding Engineer officer at Toronto, that it might remain in his office, as the contract stated, for the guidance of all concerned.

It was shewn that the commissariat officer, in exhibiting the specification and calling for tenders, was acting under instructions derived from the Royal Engineer Department, to which also he referred before entering into the contract; and it was clear, from the documents and correspondence produced, that after the contract was entered into, under instructions from the Royal Engineer Department communicated to the commissariat officer, the work was carried on by the contractors under the constant superintendence of the officers of Royal Engineers, and the clerks of works employed by them, and paid for, as it appeared, through the Ordnance Department.

The work was completed by the plaintiffs, and at the conclusion of it they rendered to the officer of Engineers at Toronto an account against the Board of Ordnance, in which they claimed nearly 1200l. above the contract price. Some of the items, being probably for extra work done, seem to have given rise to no difficulty; but the Engineer Department refused to make any allowance for the freight of stone brought by the plaintiffs from Kingston, or for an alleged alteration in the style of work on the face of the sea wall, which the plaintiffs contended was made by the order of the officer superintending, and entitled them to an increased charge.

The specification stipulated, that the lake wall, both below and above the surface, should be made of the stone commonly called lake stone, not less than four inches thick, laid dry with vertical joints, properly broken, and in regular courses of equal thickness.

It was stated at the foot of the specification, that the contractors were to find everything requisite for the completion of the work; that they were to be allowed the privilege of quarrying stone for the wall on any part of the lake shore on the military reserve at Toronto, free from all charges by the Ordnance; that they should execute the whole work in the most substantial and workmanlike manner, and the materials of all sorts to be of the best description; the work to be at all times open to the inspection of the commanding officer of Royal Engineers or persons appointed by him; all materials to be examined by such officer or persons before being used in the works. Anything wrong in the materials or workmanship to be immediately rectified according to their direction at the cost of the contractors. And the Royal Engineer Department were to have full power during the work to direct alterations in the plan, &c., without vitiating the contract; the value of such alteration to be ascertained by measurement, and paid for according to the prices contained in the current triennial contracts.

The contract seems to have been accepted in October, 1845, and plaintiffs were bound by the terms of it to have all the materials on the spot within three months, if the Engineer officer should require it, and to finish the work within three months after that, upon a written order being given for commencing the work.

On the 8th of May, 1846, the plaintiffs addressed a letter to the commanding Engineer officer at Kingston, in which they said; "having "made an agreement with the captain of a schooner to take up a load of "stone from the government quarries (at Kingston) for the lake wall

"at Toronto, for the purpose of expediting the work, as we are rather "short of materials, we would feel much obliged if you would give us permission to get this load, and to allow us liberty to procure more "material from the quarries here, as we cannot procure it sufficiently fast from the lake."

They obtained the desired permission, and on the 11th May, 1846,

they addressed a letter to the commanding Royal Engineer officer at Toronio, as follows; "as we cannot procure sufficient lake stone of the "required dimensions for constructing the sea wall at the new garrison, "we would beg leave to request permission, to use the Kingston stone, "though the latter stone will be much more expensive for us than the "lake stone, besides being better for the work. However, as we are "anxious to finish our contract as soon as possible, we will not mind the "additional expense. 200 tons of stone arrived this day from Kingston,

"and we are now waiting for your permission to proceed with the work."

The work was done on military ground, vested in the Board of Ordnance.

At the trial the plaintiffs endeavoured to shew, that the work is what is called by stone-masons rock ashlar; that it was such as could not have been made with lake stone, (that is stone got along the shore of the lake), because that description of stone will not bear dressing with the hammer, and that vertical joints, such as the specification called for, could not be made with it. They rested their claim therefore on the ground, that as the work which they were bound to do could not be done with lake stone, and as that which they had attempted to do with it had been condemned, and they were compelled to pull it down, they were driven in consequence to procure stone from Kingston, which threw upon them the expense of the freight. They endeavoured also to shew, that the engineer officers in charge required of them a description of work not only such as could not be executed with the lake stone, but work superior to that which their contract specified.

For the defence it was objected, in the first place, that no action could be sustained under the circumstances, and for such a demand, against the Board of Ordnance.

1st. Because they would not be liable to be sued upon a contract of this description under the statute, even if it had been entered into by the board.

2ndly. Because this contract was in fact not entered into by them, but by the commissariat officer on behalf of her Majesty.

These objections were for the time overruled, in order that the opinion of the jury might be taken on the facts; and leave was reserved to move for a nonsuit, if it should be determined that the action could not be sustained.

In regard to the merits it was objected for the defence, that the plaintiffs having clearly agreed to do the work specified with lake stone, and having for their own convenience procured stone from Kingston, not under any order from the Engineer Department, they had no pretence for making an extra charge on that account, and certainly no pretence for charging freight against the defendants, which was not extra work done, but mere costs of transporting a material which they had found it convenient to obtain, without being in any manner directed to do so.

Many witnesses were called to speak to the value of the work, and their testimony was strong to shew, that the wall was not made of that description of work called rock ashlar, that it was what is called coursed rubble masonry, just what the specification required, and nothing more, so far as the character of the work was concerned, though the wall is better because of better materials (a point which was not conceded by all the witnesses, than the lake stone.

It was shewn, that the plaintiffs had taken their measures for getting stone from Kingston before any of their work had been condemned or found fault with, and for their own convenience merely, as their letters seemed clearly to establish; that they had given no intimation that they would make it the ground for any additional charge, but the contrary; that the fault which was afterwards found with part of their work was on account of the stone used not being of the stipulated size, not on account of being lake stone; and that such work as the contract called for could have been well made of the lake stone, or what might have been got by quarrying on the lake shore if the plaintiffs had taken measures to do so, and that no order had been given for any change in the description of work or in the material.

Upon the whole evidence the case was left to the jury, upon the point, whether the Eugineer Department had either directed or knowingly sanctioned a deviation from the contract occasioning expense; if so, they were directed to find for the plaintiffs.

They gave a verdict for the plaintiffs for 616l. 5s.

Cameron, Sol. Gen., moved for a nonsuit on the leave reserved, and for a new trial on the law and evidence.

The principal Officers of Her Majesty's Ordnance cannot be sued in this action. It is true that the provincial legislature have, by the 30th clause of the 7th Vic. ch. 11, given a right of action against the Ordnance Department upon express agreements. However questionable in a constitutional point of view may be the power of the colonial legislature to bring a department in the service of the imperial government, residing in England, within the operation of a colonial act-its discussion is rendered unnecessary in the present case; for the contract put in at the trial is an express agreement, not between these plaintiffs and the Ordnance Department, but between them and the Commissariat Department, to whom the provincial act does not apply. The parties to the contract are the plaintiffs of the one part, and, "Assistant-Commissary-"General Thomson, acting on behalf of Her Majesty, her heirs and "assigns," of the other part; and the contract states that the plaintiffs are to receive payment from Her Majesty's government, through the Ordnance Department, either in bank notes or specie, "at the option of "the Commissariat Department." The contract, to have been binding on the defendants, so as to bring them within the provisions of the 31st clause, must, it is submitted, have been made by the Ordnance Department, or by some person legally authorized by them to enter into such a contract. This is not the case; but another department of the service, distinct and separate from the Ordnance, is made a party to the agreement; so that the agreement itself, upon the face of it, contains a fatal objection to the plaintiffs' right to recover. Should the court, however, be of a different opinion—then it is contended that the

evidence does not warrant the finding of the jury upon the merits. The verdict, in effect, denies the existence of a positive contract, on the part of the plaintiffs, to execute the work contracted for, at the specific price, which they admit they have been paid. It is difficult to conceive upon what ground the jury could find as they have done. It could only have been because they may have thought that some of the witnesses described the work as being in reality worth a larger sum than was stipulated to be paid for it by the contract price; but contracts never can be set aside upon this sort of evidence, otherwise the very end of all contracts-certainty in the price to be paid for a given job-would be destroyed. How can the plaintiffs charge for extra work done at the suggestion and upon the invitation of the defendants? Take their own letters, and nothing more conclusive could be desired to show that they voluntarily went to Kingston to get their stone, neither expecting, at the time, nor asserting nor pretending to have any claim for an extra charge on account of the superior quality or freight of the stone they there procured. The plaintiffs cannot avoid the force of their own letters; they are directly opposed to any claim for extra work, and are so exceedingly strong against them, that the court, it is submitted, must consider the verdict as wholly against the evidence, and grant the defendants a new trial upon the merits.

Sullivan and Hagarty shewed cause.

The original agreement binds the plaintiffs to do certain work and in a certain manner with lake stone. Now the work that was thus prescribed could not possibly be done with lake stone. The plaintiffs were therefore compelled to go to Kingston to procure a superior quality of stone, to enable them to fulfil their contract; and for this extra expense, rendered inevitable by the very nature of the contract, the plaintiffs seek remuneration beyond the contract price. The defendants were well aware, when they entered into the contract, that they were exacting from the plaintiffs a description of work upon lake stone which it could not bear, and which could only be executed upon a harder and better quality of stone, to be found in the Kingston quarries. It was but just, therefore, that the defendants should pay the plaintiffs the additional expense of carrying this Kingston stone to Toronto; and the jury, no doubt, influenced by this equitable consideration, gave their verdict for the plaintiffs. The evidence clearly establishes that the work done was well worth the additional sum the jury have given. The defendants have suffered no injustice by the verdict, and it is hoped the court will not feel itself compelled to interfere by granting a new trial.

As to the nonsuit. The Act 7 Vic. ch. 11, clearly gives a right of action against the Ordnance Department. The only question, therefore, for the court to determine is, whether the Ordnance Department have made themselves a party to the agreement, or not. It is submitted that they have. Look at the wording of the contract. The work was to be done according to an advertisement issued by the Ordnance Department; they were to be satisfied with the work, and they were to pay for it. The whole subject of the contract was within the duties and business of the Ordnance Department, and they had in every respect the entire and active control over it. That the Commissary General was one of the contracting parties, is no objection; he was but an

officer, contracting on behalf of Her Majesty, regarding the business of the Ordnance Department. It is not disputed that the land upon which the wall was to be erected is vested in the Ordnance; they therefore possessed the realty upon which the work was to be done; and this fact, it is submitted, will bring that Department legally within the scope and spirit of the 30th clause of the 7 Vic. ch. 11, and make them liable as defendants in this action—4 Bing. 75, 283; 5 B. & Ald. 204; 4 M. & W. 630; 6 M. & W. 815; 6 A. & E. 829; 10 Jurist. 308, 567; 4 M. & G. 160; 10 B. & C. 349; 5 M. & G. 131; 5 A. & E (N.S.) 526.

ROBINSON, C. J., delivered the judgment of the court.

The verdict does not seem to be in accordance with the evidence, and not just in itself, for a large extra charge is allowed, not for any extra work, nor for any additional expense thrown upon the plaintiffs by requiring a deviation from the contract, either in respect to work or materials. The getting stone from Kingston, for executing a work which they had contracted to make with lake stone, was their own voluntary act, not even resolved upon in consequence of any fault found with the quality of the stone which they were using, but before any pretence had been furnished for placing it on that ground, and evidently and avowedly to suit their own convenience. The plaintiff's own letters prove this too clearly to leave room for doubt. I do not see how the plaintiffs could expect to establish a claim in the face of their letters. The doing so must clearly have been an after-thought; and the verdict of the jury seems to have been rendered in consequence of opinions given by the witnesses, that this wall as it stands is worth the money claimed, and without regard to the express stipulations of the contract.

Whether it would be proper to grant a new trial upon the merits, however, s not the first question to be considered. We must dispose of the legal questions raised at the trial.

The action is against a public department of the government, to recover money claimed for labour done and materials found at their request, as the plaintiffs alleged, but for the service of the crown, as the evidence clearly shews. For such a demand no action would lie against any public officer in his individual capacity, upon the principle of the common law, laid down in the well known case of McBeath v. Haldimand, 1 T. R. 172, and of course there could be none at common law against the Board of Ordnance, suing them as a quasi corporation.

The plaintiffs assume a right to sue under a statute of this province, 7 Vic. ch. 11, called the "Ordnance Vesting Act." That act was passed, as it recites, for the protection and management of the property, and of the works under the control of the Ordnance Department; and it vests certain public lands in Canada, among others the land on which this lake wall was built, in the Principal Officers of the Ordnance, in trust for her Majesty, with the powers granted in the act "and subject to the provisions therein made."

Among the powers given in the act to the Ordnance Department, is the power to sue by the collective name of "The Principal Officers of her "Majesty's Ordnance, on any contracts whatsoever, by, to or with them, "in any way relating to the lands vested in them, or to the service of the "Ordnance Department or the defence of this province."

So far the statute conforms to the precedent set by the Vesting Act of the imperial parliament passed for a similar purpose, 4 & 5 Vic., ch. 94, but the provincial statute wholly departs from the imperial act, in adding provisions which subject the Board of Ordnance to be sued, there being no clause of the kind in the imperial act. And I must say, I hope early attention will be given to this difference between the two statutes, for the provincial statute gives reason upon the face of it to fear, that it was passed without sufficiently considering the proper objects and limits of colonial legislation.

In giving power by our statute to the Public Department of the Ordnance in England to bring actions in this country against persons living within the jurisdiction of our courts, and for causes of action arising here, nothing was done that could seem at all questionable; for without any special provision, in lividuals or companies in England or in any foreign country may sue in our courts, when the defendant and the cause of action come within their jurisdiction; and the enabling them to use a collective or quasi corporate name applies only to the manner of doing what could on general principles have been done in another form.

Whether the authority to sue in respect to contracts would, under the words used in the act, be held to be confined to express contracts, we need not now consider.

The provisions in the English and in the provincial statute are the same in this respect, and must receive the same construction. It is in authorising actions to be brought against the Principal Officers of her Majesty's Ordnance that they differ.

The 30th clause of the provincial statute provides, "that the said "Principal Officers shall and may by the said name (that is, of the "Principal Officers of her Majesty's Ordnance,") be sued, impleaded or "prosecuted, and may answer or defend any suit, action, prosecution or "proceeding to be brought or instituted against them in any court of "law or equity in this province, by any person or party whatsoever."

And in the 37th clause it is cuacted, "that no Officer of her Majesty's "Ordnance shall be personally liable, nor shall his property be liable to "any legal process in such suits, actions or other proceedings."

The English act is wholly silent as to actions to be brought against the Ordnance. It gives no such authority. If the imperial parliament had done so, there could have been no doubt that they were legislating upon a subject entirely within their control. They would have been abrogating the principle which has hitherto in England prevented any compulsory proceedings against the public agents of the government, upon contracts made by them on behalf of the crown; but there could be no question about the power of parliament, whose control extends over all interests, imperial and colonial, to make this change, and the only consideration that would arise upon such an enactment would be, as to the manner in which it was intended to provide for the satisfaction of judgments that might be so obtained.

Such a provision in a colonial statute, however, seems to give rise to other questions. It has no material effect as regards torts that may be committed against the person or property of any individual in this province, because, without any legislative provision, there was always redress for these by action against the officer or person committing them, and

he would be indemnified by his superiors or not, according as his conduct might give him a claim to it. But the material innovation which this clause makes is, in authorising actions to be brought against the officers of the Ordnance, upon contracts entered into for the public service.

And without expressing an opinion upon the extent of the enactment, which this case does not call for, I will remark, that the clause does not, at least in terms, confine the liability to be sued to actions upon express contracts, nor even to contracts express or implied, but leaves room to contend, that special actions on the case may be brought against the Ordnance, or bills in equity filed, upon grounds which would bring this military department of the government into court as defendants in such contests as that and every other department of the public service have been strangers to hitherto.

It is true, that the individual officers of the Ordnance and their servants are protected by the act against any personal liability, but there must of course be some effect intended to be gained by the verdict and judgment, and one can imagine no other than it shall be taken in any such case to constitute a direct claim upon the crown; there would be no means of enforcing this, it is true, but any hesitation in discharging it would seem to place the government in the attitude of declining to pay obedience to the law; for as the individual officers are exempted from all liability, if the provision means anything, it must be meant by it to charge the crown by a compulsory proceeding directed against its officers, and if this is to be the case upon implied assumpsits as well as upon express contracts, it may lead to effects that we may assume could hardly have been intended.

And then we are to consider that the Board of Ordnance is a military department of the imperial government, domiciled, (if I may use the expression) not in Canada but in England, always responsible as a body to the government and to parliament, but not responsible in their public capacity to colonial courts of justice, if to any courts of justice.

When we see a clause in a provincial statute, that her Majesty's Board of Ordnance shall and may be sued in any action in any court of law or equity in this province, we can see no satisfactory reason why a provincial statute should not also assume to subject the commander-inchief of the forces in England to be sued in our courts, upon any express or implied contract respecting the troops, their transportation, or the supplies furnished for them; or the admiralty, or the post-master-general, or the lords of the treasury, or the secretary of state for the colonies, for any matter in which they have acted on behalf of the crown, and by which the interest of any party here may have been or may be supposed to be affected.

I only advert to these considerations to shew my impression, that there may be cases in which the executing or the attempting to execute such an act may give rise to questions which at present, I think, might be found embarrassing, for it does, I confess, appear to me incongruous that we should find, as we may, a court of justice in a colony entertaining an action for damages against the Board of Ordnance, residing and exercising its functions in England, growing out of the construction of a fort erected under her Majesty's orders for the defence of this province against an invading enemy.

It may be said, that where the principal officers, as in the case before us, have appeared and pleaded to the action, they place themselves only in the same situation as any individual living in England, who might of course bring himself within the jurisdiction by voluntarily appearing and answering; but the difference here is, that the Board of Orduance have no choice, for the 31st clause of the act provides for a mode of serving process upon them by serving it upon a subordinate officer in the province, and if they do not appear after such service, then of course there would be judgment against them in the action.

I have considered what provisions have been made, and how they have been carried into effect, so far as anything has come under the notice of this court in regard to certain trading companies, whose principal seat of business is in England, but who have transactions in this province, namely, the Canada Company and the Bank of British North America, and without pretending to determine how far any argument, that could be drawn from what has been done in those instances, can be applicable here, I will venture to remark that the differences are obvious and striking.

But applying the facts of this case to the action brought against the officers of Ordnance under the statute, it appears to me that the action cannot be supported, for in the first place, though the statute, from the very indefinite language of the 30th clause, leaves it open to contend, that actions may be brought against the Ordnance Department upon a mere implied assumpsit, yet there is a good deal in the statute that makes against that.

The 30th clause, where it authorises the Board to sue, seems to extend only to actual contracts entered into by them through their officers; and it seems reasonable to suppose, that the legislature must have intended to confine the remedy against them within the same limits, where nothing to the contrary is expressly said. And the 34th and 37th clauses appear to favour that construction; but taking that not to be clear, still what we have here sued upon, as affording a cause of action against the Ordnance, is an express contract under seal entered into, not by them or in their names, but by "the assistant-commissary-general, "acting on behalf of her Majesty." And no implied assumpsit can lie against the Ordnance under such a contract, expressly made by the plaintiffs under seal with another branch of the public service.

The plaintiffs have endeavoured to support their claim to hold the Ordnance liable, upon evidence of their officers and clerks having superintended the work and given directions in it; but that is quite consistent with the contract, which specifies that the work shall at all times be open to the inspection of the Royal Engineer Department, and shall be executed to the satisfaction of the engineer officer. In other words, the contract places the engineer officer in no other position than the architect appointed by an individual is placed, where a building agreement stipulates that the work to be done shall be executed under his direction, and shall be subject to his approbation. That does not make the architect the party who has to pay for the work. It is true that the agreement here expresses that the work is to be paid for by her Majesty's government, through the Ordnance Department, but it is not in the power of the Commissariat Department to make the Ordnance liable to a pecuniary claim by entering into a sealed agreement on their

behalf, without any express authority for that purpose, and this agreement does not indeed profess to do so; for the Commissariat Officer in terms contracts on behalf of her Majesty, and stipulates that her Majesty's government shall pay for the work through the Ordnance Department, by drafts on the military chest.

Upon this distinct ground, that this sealed agreement, entered into by the plaintiffs with the Commissariat Officer, gives no right of action under the statute against the Board of Ordnance, for any work done under or in consequence of it, a nonsuit should in our opinion be entered, independently of any other considerations which make against the plaintiff's recovery.

If the Ordnance Department had themselves entered into the contract through their officers, then we must have considered whether the action could be supported under the statute, as upon an implied assumpsit to pay for any expense occasioned by a deviation from the contract, shewn to be by their sanction; and if it could be supported, then we must have examined how far the evidence supported such a demand upon the merits, on which point it seems to me the action must be held to have failed.

Per Cur.-Rule for nonsuit made absolute.

PHIPPS V. MOORE.

To an action of dower, the defendant pleaded, "that the demandant never was "accoupled to the said Phipps in lawful matrimony." The demandant replied that she was accoupled to the said Phipps in lawful matrimony." Held, per Cur., that evidence of cohabitation and reputation of marriage was sufficient to prove the marriage upon the issue raised by these pleadings.

Action of dower by demandant, as widow of Thomas Phipps.

Plea, that the demandant "never was accompled to the said Thomas" Phipps in lawful matrimony."

Demandant replied, that on the 7th July, 1808, she was accoupled to the said Thomas Phipps in lawful matrimony.

On the trial a witness was called, who knew the deceased Phipps and his family in 1819; he died in 1830; another witness swore, that the demandant always lived with Phipps as his wife.

It was objected, that the marriage upon this issue in dower could not be proved by this description of evidence, but that strict proof of a marriage in fact was required.

A verdict was rendered for plaintiff by consent, with leave to move for a nonsuit on that ground.

Morrison, on the leave reserved, moved for a nonsnit. In support of the objection taken at Nisi Prius, he cited 1 Brewer, 150; 21 Viner. p. 44, pl. 21; 2 Roper, Hus. & W. 461; Park on Dower, 13; 2 Starkie, 707, 3rd Edition; 18 M. & W. 265.

Duggan shewed cause, and cited Stoner v. Walton in our own court, Michaelmas Term, 5 Vic.; Viner's Ab., Trial P.; Styles 10; Cro. Jac. 102; 1 Lev. 41: 2 H. Bl. 145; Salk. 437; Andrews, 2-7; Ventris, 77; 12 Mod. 432; 2 Wils. 127; Cro. Car, 351; 2 Cr. & J. 453; 1 Ves. Sen. 313.

ROBINSON, C J .- I infer from the report of the learned judge who

tried the cause, that the evidence, as it was in fact given, was in his opinion so clearly sufficient to establish a marriage by collabitation and reputation, if it had been given in an ejectment by a person claiming as heir, and seemed to be so well understood by the parties to be so, that the witnesses were not closely pressed on the point, and he was less scrupulous than he would otherwise have been in noticing the particulars of the proof. And it was argued before us, not upon the quantity of evidence, but entirely upon the legal sufficiency of that description of proof.

No doubt the plea, that the demandant never was accoupled to said Thomas Phipps in lawful matrimony, raises an issue such as it used to be held in England could only be proved by production of the certificate of the bishop; and it is equally certain that the position, that upon such an issue in dower the trial of the fact can be only upon the bishop's certificate, and not by a jury in a temporal court as a matter in pais, is laid down in many books, modern as well as ancient, without distinction or reservation.

It is clear, however, that since the case of Ilderton v. Ilderton, 2 H. B. 145, it can no longer be maintained that such a principle holds good without exception even in England. To abide by it here would be virtually to deny the remedy for dower, for there is no ecclesiastical jurisdiction in exercise in this country to which this court could direct its writ, in those cases in which the marriage is averred to have been solemnized within this province. And where it is alleged to have taken place in England or in any foreign country, we have no power to send a writ out of our jurisdiction to which the certificate could be returned.

The question then can only be, whether in cases of dower what is called proof "of an actual marriage in fact is indispensable," or whether the jury can be allowed to determine the issue upon the same description of evidence as may be received as proof of a marriage for other purposes.

This court many years ago determined that point in Stoner v. Walton, and without overturning that decision, which has been acted on in other cases, and which we do not feel ourselves at liberty to overrule, we canno decide otherwise here.

So far as it has been contended, that the question in this case must turn upon the words "in lawful matrimony" being used in the plea, I must remark, that that form of plea can create no difficulty, if it can not have the effect of depriving this court of jurisdiction over the question, and referring it to the cognizance of a spiritual tribunal; and as that is from the nature of things out of the question, all that is to be established upon the issue is, what the plea expressly puts in issue, viz., the fact of marriage, which of course means a valid marriage, in other words such a marriage as will make the issue legitimate.

If it be not that, it is no marriage, as I conceive, in the view of our law; if it be such a marriage, then the widow is entitled to dower. Co-habitation and reputation furnish proof of such a marriage, and sufficient proof, where the jury are satisfied from the evidence given of the fact of marriage, at least until the contrary be shewn. It could not in general have been received as evidence upon an issue of "loyal matrimonie" in a real action in England, because that creates a question which a

spiritual tribunal only can determine; but it cannot create such a question here. And how therefore can it signify more with us than that the parties were in fact man and wife by a valid marriage, which they may have become without the intervention of any one whom the English law recognizes as a priest?

In Morris v. Miller, 1 Bl. Rep. 602, it is stated on very high authority, that where a lawful canonical marriage need not be proved, the only two cases in which reputation is not a good proof of marriage are, on indictments for bigamy, and in actions for criminal conversation. It has never been held in this country, that nothing but a marriage according to the canons can give a right to dower.

With respect to the evidence in cases of bigamy, the question there is, whether the person charged is to be convicted of a crime; and the criminal law of England has always been scrupulous not to convict parties upon mere legal inferences. Besides the inference, that because a person has cohabited with a woman and treated her as his wife, she must therefore be his lawful wife, must fail in the case of a person who is found to have pursued the same conduct in regard to two women who were living at the same time. But even in cases of bigamy, the courts have received proof of admission by the defendant of the first marriage, without exacting strict evidence of an actual marriage by a person present, or any other particular mode of proof.

In actions for criminal conversation, the reasons which have induced the courts to establish what is confessedly an exception to the general rules of evidence, are stated in Morris v. Miller, and in other cases.

It has been thought necessary to guard against the probability of persons setting up a marriage falsely, as a mere contrivance to recover heavy damages for the supposed violation of rights which never existed; and besides, the argument applies in some measure here as in cases of bigamy, that where a woman is found to have lived with more than one person as her husband, the inference of marriage from mere cohabitation is not so satisfactory.

Considering that the very point raised here, namely, whether the demandant in a case of dower can be allowed to prove her marriage by the description of evidence which the demandant offered, has been expressly determined in this court in Stoner v. Walton, Michaelmas Term. 5 Vic. I will remark, as to the footing on which dower may be taken to rest in this country, that if we are to take it that a right of dower in England can only follow a marriage solemnized in facie ecclesiae, and such in all points as a bishop might be expected to certify as regular upon a plea of "ne unques accouple en loyale matrimonie," which is the proper issue in dower, then it must be very evident, that with comparatively few exceptions, there would be no such thing as dower in this country, arising out of any marriage which has taken place in the country. But I apprehend it has never been considered, and will never be held in our courts, that the same marriage, whether solemnized here or abroad, which will entitle the offspring to inherit as legitimate, will not entitle the widow to her dower.

Our earliest provincial statute on the subject of marriage, 33 Geo. III., ch. 5, which rendered legal all marriages that had before been solemnized. in Upper Canada, between persons not under any canonical disqualifica-

tion, by any magistrate or commanding-officer of a post, or adjutant, or surgeon of a regiment acting as a chaplain, or any other person in any public office or employment, made the marriage to all purposes good and valid in law, and declared that the parties and their issue shall be entitled to all the rights and benefits of marriage, in as full and ample a manner as if the marriages had respectively been solemnized according to law. The 5th section of the same statute provides, that it shall be no valid objection to any marriage in this province, that it has not been solemnized in a church or chapel duly consecrated.

Now we know what further provisions were made by that and other statutes for solemnizing marriage in this province, and that they were not of that character, that could tend to establish their dependence in any respect for proof of legality upon any ecclesiastical authority or jurisdiction connected with the Church of Eugland, or upon a strict conformity with what the church holds regular, as applied to marriages solemnized within her pale.

Whenever our legislature has by statute rendered marriages valid, and declared the parties and their issue entitled to all the rights and benefits of marriage, I consider the widow's right of dower to be one of the rights and benefits thus secured, and this, I think, no one will doubt.

I assume also, that the legislature will never be held to have intended that marriages solemnized according to their statutes, whether by magistrates or the ministers of dissenting sects, or otherwise, and therefore legal at the time, should not draw after them every civil right, as fully at least as those, which, being irregular and invalid at first, had been made legal by their ex post facto enactments.

As to all marriages solemnized in the country, I conceive the only question in any action of dower, can be just what the plea in this case raises, whether the parties were "joined together in lawful matrimony" or not, which can mean no more here, than whether their marriage was legal.

In England, we know, there was a privilege claimed from an ancient period of our law, when ecclesiastical power was great and was submissively acknowledged, and when unity prevailed in matters connected with religion, that whenever an issue was raised by this precise form of words, on the lawfulness of the marriage, the common law courts should have nothing to say in the matter, and could only refer, by their writ, to the bishop, who was to see that, under his direction, the proper course was taken for adjudicating upon the fact, and what he pronounced to be the result was perpetually binding in regard to the marriage in question. The consequence then was, though it is not always plainly brought into view in modern treatises on the subject, that as the bishop would not pronounce on the validity of any marriage which was not solemnized as the church had appointed, there were cases of marriage which would not confer on the wife the right to dower, though as to other civil purposes they would be recognized as binding. Even in England, however, marriage was at first tried in the temporal courts, though afterwards, by the concession of princes, such causes were determined in the spiritual courts.—Sir O. Bridgman's Rep. 238; 2 Burns' Ecc. Law, 448,

There could never, in the nature of things, have been a privilege of the same kind in this country, in favour of any peculiar jurisdiction, which

could in any degree or manner interfere with the method of disposing of the question, whether any alleged marriage was legal or not, and therefore of necessity we can take no other question to be raised by such a plea, than whether the parties were man and wife by law; and this issue, whether the marriage is supposed to have taken place in this province or out of it, can only be tried here in our common law courts, by a jury under the direction of the court; the jury finding the facts, and the court applying the law to those facts, each acting separately in their own proper province, if a special verdict should be returned, or both giving their aid in finding as the law requires, according to the fact when a general verdict is given.

In the case of Doe dem. Breakey v. Breakey, 2 U. C. R. 349, we had occasion to consider a question arising here, upon the validity of a marriage supposed to have been solemnized in Ireland. Where the demandant, in the case now before us, was married, by her replication does not appear, but I am informed by the learned judge that it was well understood that the family came many years ago to this province from England. Now, supposing this was an action by the heir of the demandant against a stranger in possession of the estate, and that he was claiming as the issue of this alleged marriage, it is perfectly clear that strong evidence of reputation and cohabitation, if it satisfied the jury, would be sufficient to establish the fact of the marriage, so as to enable him to recover in the ejectment, and thus gain possession of the land. Then the effect of the judgment of this court in Stoner v. Walton, is to maintain, that the same evidence of the fact of marriage, gathered only, as it might be, from long cohabitation and general reputation, which would uphold a verdict for the heir claiming under the marriage, may be received as sufficient (if the jury shall be convinced by it of the fact,) to establish the widow's claimto dower.

If it should not be, we should have occasionally some strange instances of injustice, considering how our population is composed, the difficulty in numerous instances of tracing the place of marriage, the impossibility of obtaining in the province precise evidence of an actual marriage, and the certainty that in many cases, if that evidence must be procured from beyond the seas, it could only be done at an expense which the value of the widow's life interest in a third of the property would not bear.

I have found no adjudged case in England, which draws a distinction between the evidence of marriage, as required for the purpose of proving title in the heir, or for the purpose of shewing the widow's claim to dower, except when the distinction is grounded on the peculiar nature of the issue raised in dower, by the precise terms of the plea which must be pleaded in dower, and from the effect of that plea, in consequence of the privilege conceded to the spiritual jurisdiction, whenever a question is thus formally raised upon the lawfulness of the marriage. Here that can create no difficulty. In England it has, from the force of inveterate and long usage, so prevailing an effect as to marriages celebrated in England, that in Lindo v. Belisario, 1 Haggard's Consistory Reports, Appendix 9, the spiritual jurisdiction was referred to from the Court of Chancery, to pronounce upon the validity of an alleged marriage between two Jews according to their rites; and the judge, though he seemed to feel that there was something questionable and even ludicrous

in his assuming to dispose of the point, did take upon himself, with an avowed reluctance, to solve the doubt.

I have cited some cases, and many might be added to them, in which eminent judges have, without qualification or exception, spoken of trials for bigamy and actions for criminal conversation, as the only cases in which the fact of marriage may not be proved from cohabitation and reputation, provided the evidence of that description shall be such as to satisfy the jury of the fact.

No doubt when they have so expressed themselves, they did not mean to include cases where the legitimacy of a party is the express subject of inquiry; they had chiefly in their mind personal actions, not exclusively cer tainly, because in the action of ejectment, which is not purely personal but i mixed in its character, such evidence is constantly received and acted upon; and it is found, after long experience, consistent with the ends of justice to receive evidence of this description, in order to establish a right of inheritance, even where evidence of an actual marriage might be easily procured, as in Doe dem. Fleming v. Fleming, 4 Bing. 266, where a person claiming as heir to his brother was allowed to give such evidence though his parents were living, and could of course have given direct and precise proof of their marriage. That cases of dower were not meant to be included in any such general dicta of the courts as I refer to, although they were not excepted, I have no doubt, because in them as in other real actions, whenever a question arose about marriage it could only be raised by the prescribed form of plea, which referred the matter to the spiritual jurisdiction; but except for that reason, and only where that can prevail, I see no reasonable ground for a distinction.

Where there has been long cohabitation, general reputation of marriage in the family and neighbourhood, and no fact to throw suspicion on the reality of the relation, experience shews that the conclusion may be safely drawn, that the parties were legally and in fact man and wife, for where the truth is otherwise it is very commonly known, at least to those intimately acquainted with the parties.

In all our observation of the effect of receiving such proof in ejectments, I have known no one instance in which it has afterwards been shewn that the presumption was inconsistent with the fact. Of course cohabitation and reputation of being married do not of themselves necessarily prove the marriage, even where there is no evidence to the contrary. They are circumstances placed before the jury, from which they are required to say upon their oaths, whether they are satisfied that the parties were married; and where there is anything to give rise to suspicion or doubt, of course the jury will be cautious. It may seem at first, that it would not have been unreasonable in all cases to exact proof of an actual marriage, where a party is setting up a title to real estate, to which the fact of a legal marriage is indispensable; but we see that it is not in fact required in actions by the heir, when the object is to establish a right in fee simple to the whole estate, and why should it be in the case of dower, when the action concerns only a temporary interest in part of it? We should, however, not forget the circumstance, that in ejectments the verdict is not necessarily final, for the title may be disputed in a fresh action, if it should be found that the court has been

imposed upon, but unless the imposition should be discovered within a certain period, a possession so gained may ripen into a title by lapse of time. And in reality, there is danger of greater inconvenience from receiving imperfect evidence in ejectments than in cases of dower, for a verdict in ejectment, so long as nothing appears to make it questionable. is looked upon as clear evidence of the right. No one would hesitate after it to buy the fee from the heir, and to improve the property to any extent, and if some years afterwards it should be found, that by reason of there being no legal marriage, the heir who had recovered was not entitled, there would often be more valuable interests disturbed by correcting the error, than could in general be effected by any claim of dower. And indeed there are many actions in which pecuniary interests to a large amount turn upon the fact of coverture, in which the verdict is as much final and binding upon the parties as in an action of dower, and in which the marriage is notwithstanding allowed to be proved by the same description of evidence that was offered in the case before us.

In an action of covenant now pending before us, which involves the fact of a right of dower, the question of marriage is brought up incidentally, and though the verdict would be final as to the damages, there is no doubt that the marriage might be proved by reputation.

It might seem not unreasonable to exact proof of an actual marriage, where the marriage is alleged to have taken place in the province, because then it may be presumed there would be no real difficulty in shewing what the fact was, but there will appear the less reason for such a distinction when we consider, that where the connection was first formed within the province, the truth of the case may be safely presumed to be very well known; and that there is, therefore, the less chance of error in such cases in accepting proof by reputation, because the opposite party would be able easily to repel the presumption where it would be contrary to the fact. And at any rate it is quite clear, that as no distinction of this kind is made by the law of England, but the same method of proof holds when the fact of marriage is in question in ejectment, and generally in personal actions, whether the marriage is understood to have been solemnized in England or abroad, we have no authority for adopting any such distinction here. The case of Doe dem. Fleming v. Fleming, which I before referred to, leaves no room for doubt on that point.

It may be urged as a reason why we should not admit such evidence of marriage as was given in this case, that dower is an inconvenient incumbrance embarrassing to purchasers, and interfering with that free convertibility of real estate, which the circumstances of a new country require, and that it is, therefore, contrary to sound policy to facilitate in any manner its recovery; but reasons of that kind can have no weight with us on one side or the other, the only question being, whether the law ustifies us in excluding the evidence; and the argument at any rate would not be a strong one, because we should have to exact the same evidence upon the same issue in all cases of dower, as well where the claim was made in respect of lands of which the husband died seized, as of lands which he had alienated; and whatever may be thought of the ustice or policy of allowing the widow's dower out of lands which her husband had parted with, there can be no claim more just in itself and

more in accordance with humane feeling, than that the mother of a family should be entitled to some support out of the estate left by her husband, and should not be wholly at the mercy of her offspring.

In the great majority of cases in this country, where almost every farm belongs to a separate proprietor, and where we have thousands of proprietors of land of that class from which we are not to expect due care and circumspection in providing against intestacy, it is reasonable, that if dower is meant to be really a security to the widow against want, the remedy should be such as to make the benefit attainable by her in practice, with no greater difficulty than attends the establishment of other claims, requiring the satisfactory proof of similar facts. She would not enjoy her right on those terms, if she cannot be allowed to prove the fact of marriage by the same evidence that suffices to give the inheritance to her children. If the law of England requires stricter proof in dower, upon any principle irrespective of the peculiar state of things existing there from an early time, which made the right of dower depend on the fact of such a marriage having been solemnized as the Church of England would stamp with its sauction, then that maxim of the common law would be equally binding upon us till the legislature should choose to relax the rule; but the decision of this court in Stoner v. Walton proceeds upon the ground, that the necessity for stricter proof of marriage in dower can be supported on no other principle, than such as could never have had any application here, and that dower, therefore, with us, could not properly constitute an exception to the general rules of evidence respecting marriages.

We must adhere to that decision, unless we could say that without doubt it is wrong, and that it has not been so long and generally acquiesced in as to be binding upon us.

If it should be apprehended that any mischief will follow from admitting this mode of proof, with all the caution which the court and jury can be expected to exercise, then, in any legislative measure, which the subject of dower might seem to call for, the danger might be guarded against by requiring evidence of an actual marriage (as in actions for criminal conversation), whenever the claim is advanced against a purchaser from the husband, but not when the action is against the heir or his assignee, since both rights must then depend on the same state of facts; and it might be useful to provide the further precaution of enabling the court to grant a new trial within a limited time, if good reason shall be shewn to them for doubting the legality of the alleged marriage, when it had been proved only by reputation.

But it is in support of what has been already decided in the court in Stoner v. Walton, and acted upon in subsequent cases, that the legislature of this province clearly assumed and intended, that married women should be endowed of lands in this province held by their husbands during coverture, because they have passed statutes from an early period respecting the mode of barring dower, which is a recognition of the right; and no one will contend, that the right thus recognized was ever supposed or intended by the statute to be conferred only upon women who had been married in England by a clergyman of the Church of England, or married elsewhere, but under such circumstances only, as that they could obtain a certificate of their being legally married from a spiritual court.

No one, I believe, will seriously maintain, that women legally married in this province are to be excluded from dower; and if they are not to be excluded, then I take it, the question which arises in our courts here, by whatever form of words it may be raised in an action which respects the right of property, amounts to the question of "wife or not wife." which has always been treated in England as a question triable by the common law; that is by the country .- Batsworth v. Batsworth, Styles, 10. And then when we have brought the question to that, if we except the cases of actions for criminal conversation and trials for bigamy, which rest on peculiar grounds, I know of no adjudged case which does not allow the marriage to be proved (so that the jury are satisfied,) by reputation and long cohabitation, under such circumstances as raise the presumption of a legal marriage, and this, whether the proof is wanted in penal actions, in which a debt or damage is the object, or in order to shew a right to inherit land, or to support a claim to a peerage, in which latter class of cases it appears to have been received without hesitation.

Where we find it laid down that the law is otherwise in regard to the claim of dower, as we do find it laid down in every old authority, and transmitted from them into modern treatises, it is because, as the same authorities tell us, it was then held, that "ubi nullum matrimonium ibinulla dos," and because they meant by "matrimonium" as there used, not merely what might, in the view of temporal courts, be a lawful marriage sufficient to draw with it all the civil rights of marriage, but a marriage perfect in the view of the church, and such as the spiritual authority would pronounce to be so; and this is apparent in that passage of Bracton which I have referred to, where he says, 302. "if a man 'has a concubine, and has a child born of her during the concubinage, "and afterwards contracts marriage with her clandestinely, (that is, not "according to the forms required by the church,) and then has other "children by her, if he contracts marriage with her afterwards publicly "in face of the church and endows her at the church door-in this case "he will be legitimate who was born after the clandestine marriage, pro-"vided it be proved, and will succeed to the inheritance; but the "woman shall be endowed in respect to the last marriage, on account of "its solemnity and the assignment of dower in face of the church, &c."

Now as I can conceive that no case can occur, or could at any time have occurred here, in which the same marriage, which would shew the issue to be capable of inheriting, would not also entitle the widow to dower, it has been, I think, right to hold, that as the reason falls to the ground the rule falls with it.

If it could be shewn that courts in England have in any case distinctly, and upon other grounds not connected with the privileges and claims of the church, holden that in cases of dower, the same evidence of marriage which will enable a person to make good his claim to an estate in land in fee or to a peerage, will not suffice to enable the widow to recover her dower, then such case would seem to stand in opposition to the course which this court has hitherto sanctioned.

MACAULAY, J.—The objection in this case is not to the mode of trial, but to the sufficiency of the evidence. The case of Ilderton v. Ilderton, 2 H. B. 159, is in point, to shew that the question of marriage is not to be tried by the bishop's certificate, but by a jury, and that it

is to be determined according to the law of the country where it took place.—21 Vin. 44, pl. 17, 21; Cro. Jac. 102; 1 Lev. 41.

It is not alleged in the pleadings, nor does it appear in the evidence in this case, unless presumptively, where the alleged marriage of the plaintiff with Thos. Phipps, deceased, was had; but wherever it may have been, it appears to me to be properly triable by a jury—Stat. 12 Car. 2. ch. 33, and the only question therefore is, what constitutes sufficient evidence to go to the jury, to establish or to warrant them in inferring a valid or lawful marriage.

In the present instance, it rests entirely upon reputation and the conduct of the parties, and would for some purposes be no doubt sufficient; the only point is, whether it be sufficient in dower, upon issue joined on the plea of ne unques accouple en loyale matrimonie, which is the

plea here.

This plea is said not to deny a marriage in fact, but to deny a valid marriage in law, and to be admissible only in real actions, or in cases, where a lawful marriage is strictly required to be shewn. In Park on Dower, p. 7, the subject of marriage is thus introduced, "By 46 the ecclesiastical law as it stood previous to the Marriage Act, and as " it still stands as to cases falling within the exceptions of that act, the " existence of matrimony involved a two-fold consideration, comprising " within that general name the distinct facts of-1st. The espousa's or " personal contract between the parties to become husband and wife; " and secondly, the celebration of that contract in facie ecclesiae. The " espousals or matrimonial contract (though requiring no set form or " ceremonial) was the substance or bond of the nuptial relation, and was " of two kinds, viz., per verba de præsenti and per verba de futuro. former of these, in the contemplation of the ecclesiastical law, amounted "to very matrimony. (Swinb. -; Spousals, 9, 13, 15; see also 2 Sal. " 437, 438; 6 Mod. 155; and judgment of Sir W. Scott, in Dalrymple " v. Dalrymple; Dodson's Rep. 1811, p. 13) the contract being indis-" soluble by any agreement of the parties," &c.

But though esponsals or affiance, as it is sometimes termed, was thus the very substance of matrimony, yet it does not seem to have been allowed that espousals alone, unaccompanied by celebration, should confer the civil rights of dower or legitimacy, but to obtain these temporal advantages, it was requisite that the contract of matrimony should be celebrated in the face of the church.—Co. Litt. 32, 33 b.; and see other references ib. in note.

He then mentions the alterations introduced by the Marriage Act, 26 Geo. II. c. 33; Co. Litt., 82. (b.), note 4; 1 B. C. Com. 435; adding, that it must be borne in mind that the provisions of this act do not extend to marriages between Quakers or Jews, nor to marriages solemnized beyond the seas, or in Scotland; sec. 18.—See 2 Rop. H. & W. 462; 2 Rop. H. & W. 475; 2 Phill. 285.

The subject of marriage, in region to bastardy and dower, &c., is also much discussed in Hubback's Evidence of Succession, ch. 4, sec. 2, p. 296, 303, 311 to 320; Roper on Husband and Wife, 450-80; and App. 445-474; Ba. Ab. Bastard.

These shew that the canon law is the acknowledged basis of the matrimonial law of England, which law is stated in Hubback, p. 298

Dalryinple v. Dalrymple, 2 Hagg. C. R. 54; and Dodson, 32; and the distinction between regular and irregular marriages explained in Hubback, 298 to 303; and at 303, he says that at common law several of the consequences of matrimony were at one time denied to any other than regular or lawful marriages. Those contracted otherwise than in facie ecclesiæ are pronounced invalid by Bracton. So Fitzherbert says that a woman married in a chamber shall not have dower by the common law, F. N. B. 150; with a qu? of marriages in chapels not consecrated by license of the bishop, &c. Again, at p. 309, he says, the insufficiency of unsolemnized contracts to confer upon the wife the right to dower, explained the case put by Perkins, of a man contracting matrimony with J. S. and dying before marriage solemnized, when she should not have dower, for she never was his wife, that is quoad dower; but Perkins, sec. 306, says it was holden, in the time of Henry III., that if a wife had been married in a chamber she should not have dower by the common But the law is contrary at this day, which Hubback, p. 308, explains, by reason of the relaxation which took place in dispensing with the solemnization at a church; and see p. 289. And it seems to be clearly laid down, that even a marriage voidable, if not avoided in the life time of the husband, is sufficient to entitle the widow to dower:-2 Roper H. & W. 333-4; 4 Vin. 38, pl. 21; 1 Sid.64; 8 Taunt. 830; 2 Mar. 243; 2 Hagg. 400; 1 Hagg. C. R. 68.

In Hubback, p. 311, the distinction between marriages in possession or marriages de facto, and marriages strictly lawful or de jure or in right, is explained. In possession, when it arose from cohabitation or reputation; in fact, when from an act of public betrothment; de jure, when by a priest or one in holy orders, in a consecrated church, or otherwise in strict accordance with the ecclesiastical law. And at p. 312, he cites 3 Inst. 88, that, according to Lord Coke, a marriage de facto would support an indictment for bigamy.—See also 2 Roper H. & W. 462; or to entitle the widow to dower, Co. Litt. 32, 33; and 2 Phill. 16, Elliot v. Gun. And see Fleta, 528, that a marriage might be lawful as to succession and unlawful as to an action of dower.—Hubback, 319; Brown's Maxims, 214; 2 U. C. J. 117 to 128 and 139.

In a passage in Britton (Hubback, p. 305, n.), it is laid down that a woman is not entitled to dower unless duly endowed by the husband at the door of the church, though in fact privily or irregularly married elsewhere than at the church door.—2 Kent. Com. 75.

Mr. Roper, at p. 474, referring to the authorities he had previously mentioned, says they established the proposition, that, according to the law administered in England, a matrimonial contract de præsenti was essentially distinct from a marriage solemnized by a person in holy orders, and that it did not confer on a woman the right to dower, &c.; also that, according to the ecclesiastical law, the contract did not give any right except to call for a performance of it by actual solemnization, (superseded by the Marriage Act, ib. p. 446) and not conferring conjugal rights. The case of the Queen v. Millis, 10 C. & F. 534; and 7 Jurist, 911, 983; and 8 Jurist, 717; and Catherwood v. Caslon, 8 Jurist, 1076; 13 M. & W. 261 (a); seems to establish that a contract

of marriage de præsenti was incomplete, unless made in the presence of and with the intervention of a minister in holy orders. If this is now to be taken as a settled rule, it follows that to entitle a widow to dower, it is essential that she should have been legally married according to the laws of the country where it took place. In the present instance, it apparently was in England.

The foregoing remarks and references are intended merely to suggest the distinction that exists between marriages de facto and de jure, so far as may affect the right to dower, and to shew that a marriage de jure is essential thereto. What shall be such a marriage must of course depend upon the lex loci, the law of England being taken prima facie as the test, until some other law be shewn to have prevailed and governed.

Next, as to the form of the plea in dower. The plea of ne unques accouple en loyale matrimonie, is said not to deny a marriage in fact, but to deny a valid marriage in law, and to be admissible only in real actions or cases where a lawful marriage is strictly required to be shewn Allen et ux. v. Grey, 1 Show. 50, Debt,—Defendant pleads ne unques accouple en loyale matrimonie—Plaintiff demurs—Held an ill plea, because that puts it upon trial by certificate, which admits a marriage, but not secundem leges ecclesiæ; he should have pleaded no marriage in fact, and that would have been tried per pais. Judgment for plaintiff.—Basset v. Morgan, I Lev. 41; Leigh v. Hanmer, 1 Lev. 53; 1 Sid. 13, 64, 387; 1 Keb. 41; 2 Sal. 437; 2 Cro. 102; 1 Vent. 77; Andrews, 227; 12 Mod. 432.

In bringing the action, the plaintiff knew this plea might be made a ground of defence; and the onus is upon her to meet it, by proving a lawful marriage. If she cannot do so by legal and sufficient evidence, it is her misfortune. Her inability to give adequate proof of it does not warrant the inference that it was true, or dispense with the degree of proof required in such cases in England.

The trial of marriage upon a plea of ne unques accouple by the bishop's certificate, had its origin, as I understand it, in jurisdiction—the ecclesiastical courts having exclusive jurisdiction on the validity of marriages de jure, and being the sole judges of the lawfulness of marriage, when that question was directly in issue.—Rex v. Millis, ante.

When it concerned only a marriage in fact or in possession, wife or not wife, it was sent to a jury.—2 U. C. J. 125, note. It follows as a consequence, that the temporal courts or courts of common law disclaiming or not having jurisdiction to try whether a marriage was lawful or not, they did not take judicial notice of what constituted such a marriage in the eyes of the ecclesiastical courts, or what amounted to sufficient evidence, or proof thereof to establish the same in those courts.

The issue of devisavit vel non, in cases of wills disputed in chancery, seems to me to bear analogy.

The foregoing remarks are intended to shew what description of marriage is required by the law of England to entitle a widow to dower, the meaning and effect of the plea of ne unques accouple to an action for dower, and the principle upon which such issue was tried by the bishop's certificate, in other words, by the ecclesiastical court. I have also observed, that here the same issue, contrary to the course in England, must be tried by a jury; that is, that ex necessitate this court must, with

the aid of a jury, investigate and determine what is a lawful marriage, when put in issue in dower. The plea assumes the necessity of the plaintiff's proving a lawful marriage, and denies it; and assuming our jurisdiction to try the question, the only points for consideration are, what is a lawful marriage to confer a right to dower, according to the lex loci, when the place appears, and what is sufficient evidence thereof to go to a jury. No place being shewn in this case, it may be inferred that the marriage, if it did not take place in England, must be judged of and established by the law of England as it stood in 1792, until the contrary appears. But if not so, still the principal question is the sufficiency of the proof. What would be received as sufficient proof in an ecclesiastical court in England, we cannot conclusively infer; but it may be material to bear in mind that the forum is different, and that in ascertaining facts through the medium of a jury, the rules of evidence may be more flexible and a wider scope exist for presumptive inferences, than would be sanctioned in an ecclesiastical court.

That the rule, as formerly understood on this subject, has been partially relaxed even in spiritual courts, may be inferred from what is said in Park on Dower, p. 14, and in Hubback on Succession, p. 319, 235, where it is remarked, that it would appear to be in cases only where the marriage was absolutely void, and where, being voidable, it was annulled by sentence in the spiritual court during the life time of the parties, that the illegality of a marriage is an impediment to a claim for dower, referring to Co. Litt. 33, b; and see Parke, p. 21.

If the cases of trials for bigamy be referred to, some of them also tend to shew, that when a jury is to decide the fact of a valid or legal marriage, it may be presumed or inferred from proof of reputation, conduct of the parties, declarations and admissions, and such like secondary or presumptive evidence, without express proof.—See Rex v. Simmonusto, 1 C. & K. 164, 197; and 1 East. P. C. 470, Truman's case.

The recent case of Rex v. Millis, ante, and Catherwood v. Caslon, 13 M. & W. 265, do not seem to warrant any extensions or relaxations of the rule of evidence, without at least great caution and deliberation; with these cases, however, reference should also be had to Calterall v. Sweetman, 9 Jurist 951; 1 Roberts, 304; Calterall v. Calterall, 11 Jurist, 914.

It is obvious, that if there be sufficient evidence to go to the jury to warrant the inference of a marriage, where such evidence is only general and presumptive, the jury can only with propriety infer a legal marriage on the maxim of omnia presumuntur rité et solemniter acta.—Hubback on Succession, 262; 1 Add. 66; 4 T. R. 468, Wilkinson v. Payne; as to which see Evans' Pothier, 330. In like manner when possession raises a presumption of title, such title is primâ facie taken to be in fee.—4 Taunt. 16; 5 Taunt. 326; 1 Mars. 68; 19 Went. 161 note (b).

Still the difficulty remains, of what shall be accepted as sufficient evidence to go to a jury, to justify the inference of a lawful marriage.

In Best on Presumptive Evidence, p. 70, it is said the law in general presumes against vice and immorality, and on that ground holds cohabitation, reputation, &c., presumptive evidence of marriage (4 Bing. 266; Peak, 233), except in indictments for bigamy and actions for crim con., in both of which an actual marriage must be proved.—Morris v. Miller,

4 Burr. 2057; 1 W. B. 632; Birt v. Barlow, 1 Doug. 171. To which, on the same principle, might be added actions for dower, when ne unques accouple is pleaded.

Rex v. Inhabitants of Brampton, 10 East. 282, relates to presumptions in favour of the legality of foreign marriages. Read v. Passer, 1 Esp. 213; Peake, 303—Lord Kenyon said, evidence from cohabitation, reception by the parties' families as man and wife, was under every circumstance admissible. Hervey v. Hervey, 2 W. B. 877—similar effect. Leader v. Barry, 1 Esp. 353—Lord Kenyon said, crim. con. was the only civil case where actual marriage must be proved; and so for indictment for bigamy, not of course adverting to the trial by the Dishop's certificate.—Cowp. 594; Gordon v. Gordon, 3 Swan. 400; Haydon v. Gould, 1 Sal. 119; Doe Breakey v. Breakey, 2 U. C. Rep. 353.

The sufficiency of the evidence in this case to go to the jury, seems to have been determined in this court in the case of Stoner v. Walton, which governs the present. Were it not so, I cannot say that I am otherwise satisfied that it ought to be so held, although I freely admit the force of the argument ab inconvenienti; and that when (as in this instance) parties come from Europe as husband and wife, with families, and settle here and live together, treating each other as such—so hold themselves out to the world—and are reputed and received in society as married—a valid or lawful marriage ought, after the death of one or both of them, to be presumed in the absence of anything to create any suspicion to the contrary.

What would have been sufficient to induce the bishop to grant his certificate, had the case arisen in England, is by no means clear; perhaps such proof might now be accepted, though I find no authority warranting that conclusion; at all events, the question is not to be tried here by such certificate; and though on this issue proof of a marriage in possession or de facto would not be of itself sufficient, still there being sufficient presumptive evidence of such a marriage, the argument is no doubt cogent, that the jury were warranted in therefrom inferring a valid or legal marriage, to entitle the plaintiff to dower. If so, the jury have found such marriage, and it is not impeached by any evidence on the defence. The objection is, that at the utmost the evidence only affords proof of a marriage in possession or de facto, and that being only presumptive evidence thereof, it warrants no other or stronger inference; and that in dower facts must be shewn which establish or warrant the inference of a valid legal marriage (in England, a marriage in facie ecclesiae, or by a person in holy orders), according to the laws of the country or place where it took place. and that the facts in evidence are not specific enough to justify the conclusion sought to be established.

The case of Stoner v. Walton, however, has determined, that in this court a marriage in lawful matrimony may be inferred or presumed from circumstances such as were shewn in the present case, and the convenience of so holding, and the safety, generally speaking, of acting upon it, are much in its favor, however it may, strictly speaking, innovate upon the rules of evidence, as to the sufficiency of the proof that prevails by the law of England.—11 Jurist, 607, Doe Jenkins v. Davies.

JONES, J.—The case was tried before me at the last spring assizes for this district.

The marriage was proved by reputation alone. The objection at the trial was, not that the evidence did not establish a marriage by reputation, but that in an action of dower a marriage proved by reputation would not support the recovery-that a marriage in fact should be established.

A verdict was taken for the demandant, subject to be set aside, and a verdict entered for the defendant, if, in the opinion of the court, a marriage in fact must be proved in an action for dower.

This point was expressly decided in favour of the demandant, in the case of Stoner v. Walton in this court, and I think, for the reasons assigned in the judgment of the court, that the decision was quite correct, and should be upheld.

Per Cur.-Rule for nonsuit discharged.

French v. Kingsmill, Sheriff, &c.

A notice in general terms to the execution creditor, before the sheriff could have levied under his execution, of the debtor having committed an act of bankruptcy, is sufficient, without specifying any particular act of bankruptcy, to protect the debtor's property for the benefit of all the creditors.

Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall issue upon it within two months, and provided that the execution creditor, or his attorney, was aware of the fact before suing out execution.

Case for false return to writ of fi. fa. against the goods of one Chapman, at ahe suit of French, the plaintiff.

First count charged, that the sheriff did levy the amount, but falsely returned "nulla bona."

The second count, that there were goods which the sheriff might have levied, and that he neglected to do so.

Pleas, to the first count, that the defendant did not levy.

Second, to second count, that there were not at the time of delivery of the writ to defendant, or at any time afterwards, any goods of Chapman within his district on which he could have levied.

Plaintiff had recovered judgment against one Chapman, and took out ft. fa. against goods, indorsed for 503l. 9s. 8d. besides interest, &c., which was delivered to the sheriff (defendant) on 17th March, 1846. It was returnable on first day of Easter Term next, and was returned "nulla bona." The question at the trial was, whether the sheriff acted rightly in forbearing, as he did, to seize the defendant's goods, under the impression that they were protected from the benefit of Chapman's creditors, under the operation of the Bankrupt Laws.

Witnesses were examined at the trial, for the purpose of shewing that Chapman had committed acts of bankruptcy, by giving a fraudulent preference to certain creditors, in allowing them to take what goods they pleased out of his shop, while he contemplated bankruptcy and knew that his failure was inevitable. It was also shewn that before the ft. fa. was put into the sheriff's hands, Chapman had made a declaration of insolvel.cy, on which a commission of bankruptcy issued against him on the 17th March, the declaration of insolvency having been filed on the 16th. The only question was, whether the plaintiff or his attorney had sufficient notice of an act of bankruptcy before the time when the sheriff might have levied, and when he was urgently pressed to levy by the plaintiff's attorney.

The learned judge at the trial considered, that it would not be sufficient to shew to the satisfaction of the jury, that the plaintiff's attorney, before he placed the writ in the sheriff's hands, had knowledge, or was told in general terms, that the debtor had "committed an act of bankruptcy, but that it was necessary to shew that he had been made aware of some particular act of bankruptcy.

Upon this charge the jury gave a verdict for the plaintiff for 503l. damages, the amount endorsed on the \hat{n} . fa.

Cameron, Sol. Gen., moved for a new trial on the law and evidence, and for misdirection.

There are two points to be determined: 1st, was the notice of declaration of insolvency having been filed, a sufficient notice of an act of bankruptcy from the time of its filing. 2ndly. Was the general notice of bankruptcy, served upon French through his attorney, sufficient, without specifying any particular act of bankruptcy. Upon the first point, there could be no doubt-the 15th clause of our act 7 Vic. ch. 10, being decisive -a declaration of insolvency having been filed is clearly an act of bankruptcy from the time of its filing. - See also Law Times, 27th November, 1847. 2ndly. The general notice, shewn to have been given to Mr. Boulton, the plaintiff's attorney, was sufficient. It was quite as specific as the notice given in Udal v. Walton, 14 M. & W. 254, viz. "that the defendant had committed several acts of bankruptcy," which was held by the Exchequer to be all that was necessary to prevent the property passing to the execution creditor.—See 12 M. & W. 171; 10 M. & W. 22. Upon the authority of Udal v. Walton, the learned judge, it is submitted, was wrong in holding the notice given in evidence at Nisi Prius to have been defective, in not pointing at a particular act of bankruptcy-and a new trial should therefore be granted.

The Hon. R. B. Sullivan shewed cause. All that was proved was, that French, through his attorney, had notice of Chapman's having signed a declaration of insolvency; that is not a sufficient notice. It is the filing that makes the declaration of insolvency an act of bankruptcy.—4 Bing. 173. In 1 Dowl. N. S. 778, there was, it is admitted, a notice somewhat similar to this, but it differed in this essential point, that there the party had notice of an act, which was afterwards pronounced to be an act of bankruptcy. Here there was no notice, but of a declaration of insolvency, not then filed, or known to be filed.—2 T. R. 141. The ruling of the learned judge at the trial, as to the insufficiency of the notice, it is submitted, was correct.

ROBINSON, C. J.—The law has been taken to be, as laid down by the learned judge at the trial, on the supposed ruling to that effect in the Common Pleas, in a case of Conway v. Nall, 14 L. J. N. S. in C. P. 165; but in a later case in the Exchequer, of Udal v. Walton, 14 M. & W. 254, that decision was reviewed, and was shown not to be a determination to that effect; and the Court of Exchequer determined, that a notice to the execution creditor, that the defendant "had committed several acts of bankruptey," without anything more specific, was sufficient to put him on

inquiry, and so to protect the property for the benefit of all the creditors under the subsequent commission. Indeed, in several previous cases, the same opinion had been expressed, though not in terms so clear and decided, as in Hocking v. Acraman, 12 M. & W. 171; Ramsay et al. v. Eaton, 10 M. & W. 22.

As there was an erroneous direction in this respect, there must be a new trial without costs, in order that the case may go to the jury without prejudice on that point, by their being instructed, that a notice in general terms, of the debtor having committed an act of bankruptcy, may suffice.

With respect to the declaration of insolvency made by Chapman and filed on the 16th March, there has been a late decision in England, in Green v. Laurie, Law Times, 27th November, 1847, Exchequer, establishing, what indeed is clear upon the language of the 15th clause of our statute, that notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall issue upon it within two months, and provided, of course, that the plaintiff, or his attorney, was aware of the fact before suing out execution.

Jones, J.—The question upon which the case turned at the trial was, whether a general notice to the attorney of the plaintiff, "that an act of bankruptcy had been committed, was sufficient, or whether it should not have stated the particular act of bankruptcy. I directed the jury, that in my opinion a general notice was insufficient.

In this, I find, I was incorrect. The question has arisen frequently without being expressly decided; but in 14 M. & W. 254 Udal et al. v. Walton, it was determined, that notice of an act of bankruptcy having been committed was sufficient, and it was not necessary that the notice should state the nature or particulars of any act of bankruptcy.

If the jury were of opinion that an act of bankruptey had been committed, and that notice was given to Mr. Boulton before the delivery of the fi. fa. to the sheriff, without stating the particular act of bankruptey, I should have directed them to find for the defendant; because the declaration of insolvency, filed on the 16th, was an act of bankruptey, and the fi. fa. was not delivered to the sheriff till the following day.

MACAULAY, J., and McLean, J., concurred.

DRAPER, J., in the Practice Court.

Per Cur. - Rule absolute without costs.

KIMBALL V. SMITH.

To sustain an action on the case for seduction, stating the debauching plaintiff's daughter and servant, whereby she became pregnant, and laying consequential damages from loss of service—the plaintiff must prove the defendant to have been the father of the child—mere proof of seduction by the defendant will not be sufficient.

Action for seduction, not laying it as trespass, but stating, as is usual, the debauching plaintiff's daughter and servant, whereby she became pregnant, and laying consequential damages from loss of service and expenses attending her confinement.

Plea, "not guilty."

The evidence shewed the young girl to be of very indifferent character, and left it extremly doubtful, at least, whether the defendant or some other person was the father of the child.

The learned judge considered, that it was essential to the maintenance of this action, that the jury should be satisfied that the defendant was the father of the child.

The jury found for plaintiff 50l. damages, on the ground, as they expressed it, that the defendant had seduced his daughter, but they declared themselves unable to agree as to who was the father of the child.

Leave was given to move for a nonsuit on the judge's charge.

J. Duggan moved accordingly; no cause shewn.

ROBINSON, C. J.—There should, in my opinion, be a new trial without costs, for if the jury were not satisfied, as they declared they were not, that the defendant had committed the injury, which is the gist of the action, namely, the seducing plaintiff's daughter, whereby she became pregnant, they ought not to have given damages for the loss of service, as occasioned by that injury, and how the fact was is yet to be ascertained.

Our statute 7 Will. IV., ch. 8, affords no room for any doubt on this question, that might not equally be raised in England.

It dispenses with the necessity of giving actual evidence of service rendered by the daughter to her father, and places the plaintiff, in that respect, in the same situation as he would be either here or in England, after the relation of master and servant had been established by evidence, as it was necessary formerly to do by some degree of evidence in all cases in England, and as must yet be done there under some circumstances.

We are to look on the daughter, in this case, as if it were the ordinary case of a daughter living in her father's family, assumed, both here and in England at the present day, to be rendering acts of service; and then the next step necessary to show a right of action, is to show a loss by the interruption of that service in the manner alleged.

If that can be said to have been proved, then the plaintiff has a right to recover, otherwise not. The jury found it was not proved, and yet gave 50% damages against the plaintiff, which was wrong.

There is no complaint on this record of a trespass to the freehold of the plaintiff. All rests on the loss of service and consequential damages as the gist of the action.

The personal wrong to the daughter, if it can be called such when she assents, does not per se give any right of action to her father.—Styles, 398; Peake's N. P. C. 55. Until the jury, in such a case as this, finds such an injury committed by the defendant, as could have occasioned a loss of service, admitting the relation to exist, there is nothing to found their verdict upon.

It is quite a distinct question, whether, under possible circumstances, a defendant might not be liable in such an action, although the girl seduced may not yet have given birth to a child of which he was the father. That he might be, was intimated by Lord Denman in Joseph v. Cavender, referred to by Mr. Roscoe in his Treatise on Evidence; but in any such case, the ground of damage laid in the declaration must be consistent with the facts to be proved, not in opposition to them.

JONES, J.—This is an action on the case for seduction. I consider the case to stand upon the same ground that it would have stood before the passing of our act 7 Will IV., ch. 8, and to require the same evidence to support it, except that by the statute proof of acts of service is dispensed with.

Trespass is the usual remedy for seduction, but case may be brought per quod servitum amisit. In the former, the gist of the action is the trespass to the close, and the seduction is mere aggravation; and if the plaintiff fail in proving the trespass, the defendant is entitled to a verdict. The facts of this case and the finding of the jury shew, that trespass would have been the proper action.

In case, the gist of the action is the loss of service, and slight evidence of service was always admitted, and it has been decided, that when the relation of parent and daughter exists it is not necessary to prove actual service-Rex v. Inhabitants of Chillisford, 4 B. & C, 102; but the statute referred to settles any question of that sort here. Loss of service is required to be proved, in order to sustain the action. It seems inconsistent to require proof of loss of service, when you dispense with proof of acts of service by statutable provisions, and in England dispense with it in an action by the father, because as Littledale, J., says in Maunder v. Vernon, 1 M. & M. 323, "if actual service were required, a duke or a marquis "never could bring this action;" the distinction seems to be, liability to perform acts of service arising from the relation of parent and child, the child residing with the parent. While the statute dispenses with proof of acts of service to establish the relation of master and servant, it leaves the law as it stood, with regard to loss of service from the seduction, as the foundation for damages.

It is certain that pregnancy does not always follow seduction, but I see no case, nor have I heard of any other than the present, where an action for seduction was attempted to be supported when pregnancy was not proved to be the consequence.

If an action for seduction could be sustained without such proof, it is strange that no trace of any such can be found in the books. I therefore apprehend that in England no such action could be supported, and consequently I should not feel justified in holding that it could be sustained here, although I think the legislature might as well have dispensed with proof of loss of service to sustain the action, as of acts of service, to establish the relation of master and servant; the jury being allowed to give compensation for the loss which the parent has sustained, by being deprived of the comfort and society of his child, and by the dishonour brough tupon his family, which in most cases are the real ground for damages.

MACAULAY, J., and McLEAN, J., concurred.

DRAPER, J., in the Practice Court.

Per Cur.-Rule made absolute.

ALWAY V. ANDERSON.

The purchaser of property sold for rent must remove the same from off the premises within a reasonable time after the sale. If property be sold on the 15th of February, and the purchaser enters to remove it from off the premises on the 26th March following, he win be liable as a trespasser.

Hop-poles left standing in the ground, after the hops growing upon them have been picked, are not distrainable.

ROBINSON, C. J., dissentiente.

Trespass quare clausum frequi, and cutting down and taking away a large quantity of hop-poles belonging to the plaintiff.

Plea, general issue "By statute."

The defendant justified under 11 Geo. II., ch. 19, as for a distress rent. The defendant was entitled, as it appeared, to distrain for rent, and under his warrant some things were seized in his farm in February last, which were undoubtedly distrainable, and also these hop-poles, about which the question had arisen. But a few of the hop-poles had been taken up the previous fall and laid on the ground. By far the greater part were left standing in the hills, as when the hops were growing, and had been frozen in so that they could not be drawn out. In April the defendant, who had bought them at the sale under the distress warrant, sent his man to cut them down and carry them away.

The defendant's servant, in March, 1847, was threshing or cleaning in the barn some of the grain and seed which defendant had bought at the same time, and plaintiff came to him and said he wished him to quit, and gave him a paper on which was written the following notice: "I "hereby request you to remove the clover seed to-morrow, and every-"thing else within four days from this date."

The plaintiff asked the defendant's servant when he was going to take away the poles; the servant answered that they could not then pull them. Plaintiff said they would have to pull them out, for that they had no right to chop them, and on the next day, when the servant told him that they were cutting them down, he made no remark. The plaintiff, admitted that the defendant had offered to pay him if he would allow the poles (about 6000) to continue in the ground till the spring, and that he had refused to do so.

The plaintiff, in order to shew damage, gave evidence that the value of the poles on the ground would be about 45*l*., and that it would be expensive and troublesome to extract from the ground the stumps that had been left frozen in. He also called witnesses, who were allowed to give evidence of the profits which he might have made by his hops, if the poles had been left in the ground, and he had cultivated the ground the following season. All that was seized brought only 62*l*. 3s. 8d.; the hop-poles selling for 15*l*.

The learned judge considered, that the hop-poles standing in the hills on the ground, as they had been left when the vines were taken from them, were not distrainable, and that defendant was liable in trespass for cutting them down and taking them away.

Verdict for plaintiff for 125l.

Wilson, of London, moved for a new trial for excessive damages, and for misdirection.

The defendant is clearly entitled to a new trial for excessive damages. Supposing the hop-poles were not distrainable, and the landlord was therefore liable in trespass for cutting them down and taking them away, still the damages were out of all proportion to their value. The jury have given the plaintiff damages to 125l., and the poles are said to have been worth about 15l., and the defendant himself offered them to the

plaintiff for 201. It is evident therefore, gross injustice must be done to the defendant, if the verdict for 1251. were allowed to stand. defendant, however, it is submitted, had a right to distrain, and, of course, if this right be conceded the damages should be nothing more than nominal. Hop-poles, though standing in the ground, as these were, with the hops picked, are distrainable; they are not fixtures properly so called to the freehold; they ought to have been found detached from and not united to the freehold after the hops had been gathered; they are in law fixtures only so long as they are required (like other implements of husbandry) for the due cultivation of the soil. While the hops are growing upon them, they are protected from distress, while separate from these, they can be distrained. The mere accident of their being firmly set in the ground by frost, will not, though perhaps it may be so contended, give them the character of fixtures. Would a spade or a plough, if left imbedded in the ground by design or accident, be exempted from distress? These articles have a certain known use, and if distrainable when so employed. the mere fact of their being laid by, at a time when there was no immediate use for them, in a fixed position, will not make them fixtures for the moment, and not distrainable. -4 T. R. 565; G. & D. 234; 4 B. & A. 206; McClelland's Rep. 217.

J. H. Hagarty shewed cause.

The plaintiff is certainly entitled to a verdict for something irrespective of the right to distrain, or of the measure of damages. The defendant was bound to remove the poles from off the premises within a reasonable time. He distrained on the 15th Feb., and did not enter the premises, to carry away the poles, until the 26th of March. The lapse of time between the distress and the entry was therefore such, as to make the defendant liable in trespass, at all events, for nominal damages. question of substantial damage would turn upon the right of the defendant to distrain for the standing hop-poles. Upon this point, it is submitted, there was no misdirection on the part of the learned judge at the trial. One of the principles laid down in Co. Litt. 47 a., 47 b., as governing the right of distress, is, "things fixed to the freehold cannot be "distrained for rent." Now these poles were clearly fixed, let into, and united to the freehold in such a way, as that they could not be displaced without a forcible severance from and injury to the freehold. It is true, that when distrained, the hops had been picked from them, and the poles were not therefore in actual use for the support of the hop. If distrained when the hop was upon them, the distress would clearly be illegal; and it is difficult to see upon what principle the mere non-user for the support of the hop, while the position of the poles in the soil or freehold remained unaltered, should make them less fixtures, and introduce per se the right of distress. There is no authority in the books recognizing such a principle; and it is submitted, that the right of distress will remain unaffected by the user or non-user of the poles in the immediate support of the hop-vines.—Woodfall, 320-6; Bradby on Distress, 147. Could it be said the damages were excessive? The value of the mere poles was stated to be about 45%. There was, besides, the expense of replacing the poles the defendant had removed; the stumps of those cut by the defendant would have to be taken up and new ones put down. Upon the whole, therefore, as the plaintiff had unquestionably a right to nominal damages, without reference to the validity of the distress; as moreover the right to distrain, being with the plaintiff, entitled him to substantial damages; and as the excess, if any, was but small—the rule for a new trial should be discharged.

ROBINSON, C. J.—The plaintiff was clearly entitled to recover a verdict for some damages, for the trespass of which he complained in his declaration, and to which his evidence at the trial applied, was not the entering in April and cutting and taking away the hop-poles which he had purchased long before, when sold under the distress warrant. That we must regard as a new trespass, upon the principle laid down in Winterbourne v. Morgan, 11 E. R. 395; and to this new and distinct trespass, the defence was not, that the distress warrant gave the right to enter and seize upon that occasion, in which case the general issue would have admitted the defence under the statute 11 Geo. II., ch. 19, but that the poles were the property of the defendant, having been bought by him at the sale.

In fact, the question to be tried was, whether the distress and sale were legal, so as to pass the property; and the defendant, though he was the landlord, at whose instance the distress was made, stood in no other situation, in respect to the entry on the premises in April and cutting down and taking away the hop-poles, than any other person would have stood, who might have bought them at the same sale. Could, therefore, the defence, which really turned upon the right of property, be given in evidence in this case under the general issue? It clearly could not, unless by virtue of the statute 11 Geo. II., ch. 19, but I think neither the 8th nor 10th clause of that statute could receive such a construction, as to allow a purchaser at the sale to enter at an unlimited distance of time, in order to recover what he has purchased. In Winterbourne v. Morgan, Lord Ellenborough says, "it is not a necessary consequence of "my having goods in another man's close, that I may remove them by "my own act; and it appears to me to make no difference, that I might "once have moved these goods from the place where they now are, and "have done all necessary acts for the purpose without being a trespasser, "when the authority which exempted me from being a trespasser has "wholly ceased."-Cro. Eliz. 246.

The permission given by the 8th clause of the statute extends only to the period when the crops shall become ripe for gathering, and gives the party a right to enter then, in order to gather and secure them; and he may afterwards have them "appraised, sold and disposed of, in the same "manner as other goods and chattels may be seized, distrained and disposed of." This does not, by any fair construction, allow the purchaser at the sale any greater privilege, in regard to the deferring the removal, than he would have in general.

The 10th clause, which allows the landlord to impound the goods on the premises, and permits "any person to come and go to and from the "premises, in order to view, appraise and buy, and also in order to carry "off and remove the same on account of the purchaser thereof," leaves it still a question, as to what is a reasonable time for exercising such a privilege, that the purchaser may be regarded as acting under the statute. And do not think we can hold otherwise, than that a purchaser entering in April, in order to take away goods which he has purchased in February

commits an act of trespass, as distinct from anything authorized by the distress warrant, as the act which was complained of in Winterbourne v. Morgan.

If by what had passed between the plaintiff and the defendant or his servant the objection to delay was waived, and a right of entering to take away the goods in April had been implicitly given, it was necessary to have pleaded a license in order to let in such a defence, unless the plaintiff's evidence had been such as to shew that no trespass was committed.

As the plaintiff was entitled to a verdict, we have only to consider whether he has obtained substantial damages when he ought not, owing to any misconception of the law. That brings up the point of the legality of the distress. If the hop-poles as they stood in the ground could properly be destrained, then they became by the sale the defendant's goods, and the only damage suffered by the plaintiff could be from the entry on his ground in April, which could do him no great injury, and from the manner of removing the poles; that is, by cutting them and leaving part frozen in the hills, which of course the plaintiff would have the trouble of removing in the spring.

It would be extravagant to allow 1251. for such injury, and the jury did not in fact do so, but were permitted by the learned judge to estimate and to allow for the value of the poles, and for the loss and inconvenience occasioned to the plaintiff by depriving him of them.

Whether the jury, in their estimate of consequential damages, took into account more than could properly be suffered to enter in the estimate, is one question. Whether the distress was legal or illegal, is another question, which should be disposed of first, and which I do not find it easy to dispose of upon clear authority.

The two principles which are applicable are shortly stated in Co. Lit. 47 a., 47 b. 1. Nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken. 2. Things fixed to the freehold cannot be distrained for rent.

It has been contended that these hop-poles were fixed to the freehold, and so not distrainable. If that be so, it disposes of the question of right on the simplest ground.

It is urged as conclusive evidence of their being fixtures, that the defendant could in fact no otherwise detach them from the soil, than by cutting them down. So far as that may have been rendered necessary by the poles being frozen in, I do not consider that we can allow force to a circumstance of that temporary and accidental nature. Chattels of a clearly moveable kind are often frozen to the ground in the winter season, when standing in a wet stable yard, as sleighs, waggons, &c., but that could not make them in law fixtures and not distrainable; we must look at their general character.

It has been laid down, that in order to constitute a fixture, it is necessary that the article should be let into or united to the land, or to substances previously connected therewith. It is said not to be enough, that it has been laid upon the land and brought into contact with it, but that the definition requires something more than mere juxtaposition, as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened

to some fabric previously attached to the ground. Now these hop-poles, while they stood in the hills, were certainly "let into and united to the "land," and we may say of them, that they were not merely laid on the land, but that "some portion of the soil had been displaced for the pur-"pose of receiving them." We must say the same of bean-poles or peasticks set in the ground for the purpose of supporting the annual plant while it is growing. The only difference that I am aware of is, that the hop-plant is not an annual, and that the poles are generally perhaps left standing in the ground for rather a longer period of the season. They are usually, as we know, removed in the autumn when the hops have been picked, and are stacked on the ground, and set again in the next season after the hills have been put in order.—Cro. Car. 515. That is the common course of husbandry; part of the plaintiff's poles in the same field had been taken up and were seized and distrained; and about the right to seize them no question is raised; the remainder were, in exception to the common course, left standing in the autumn till the frost had fastened them in. As they stood then, they were not, I think, fixtures in the general sense, as between landlord and tenant, considering the distinctions that are drawn, in respect to the definition of fixtures, which I have given from the books. It was not their common condition to be fixed to the soil. They were only temporarily placed in the hills, to continue there while the vines required support. They were of no use to the root through the winter, and were not left there for that purpose, but, on the contrary, they would impede the requisite attention in the following spring, unless removed before the hills were made up. Their case, if they had been removed, as in the common course they would be, would not resemble that of a mill stone taken out for a time to be picked, because the general condition of that is to be fixed in the mill and working, and the unfixing it produces an exception to its general state, of rare occurrence.

I conceive that there can be no doubt that these hop-poles were chattels removable by the tenant at his pleasure during his term, and liable to be taken in execution to satisfy his debts; and they would not, I think, be entitled to privilege as being fixtures put up for agricultural purposes, and at any rate not when there was no other sufficient distress.

Indeed, the consequence of anything being fixed to the freehold is attended with different considerations in some cases, according to the party who is seeking his remedy by distress or execution.

Where there has been a subletting, and an intermediate landlord seizes anything fixed to the freehold, he may be interfering thereby with the right of the owner of the soil; but here it is the owner of the fee who has distrained, and I think the question of right to distrain must turn on the other point, namely, the application of the principle, "that nothing shall be distrained for rent that cannot be rendered again in as good plight as it was at the time of the distress taken."

It was on that point that the case of Darby v. Harris turned, 1 Ad. & Ell. N. S. 895, and where it applies it is a reasonable and convenient exception to the general right to distrain. Then does it apply here?

The object of maintaining the principle is, that if the tenant should pay his rent before the time for sale arrives, he should be able to receive back the article in the same plight as when it was distrained. That

certainly would have been the case literally, for if the tenant had, within the five days allowed him by the statute, tendered his rent, the landlord must, and no doubt would, have left the poles standing in the hills, and nothing would have been changed in their condition. That would have been in fact the consequence, and if the distress had happened to have been made at a time when the hops had been picked, and the poles could have been easily pulled from the ground, then there would have been in my opinion no objection to the distress. If they had been left untouched during the five days, that would have been no injury to the poles nor any damage to the tenant, though no doubt the landlord could legally have taken them up immediately on seizing them. The leaving the goods in the interval without removal or disturbance is the more common course, as noticed by the court in the case of Washbourne v. Black, 11 Ea. 405, note.

If we are to make no difference on account of the accidental circumstance of the poles being frozen in the ground, and are not to look upon them as attached to the soil for any purpose of the tenant, which at that moment they really were not, for he had merely neglected to pull them, then I do not see clearly that they were not distrainable. The crops that had grown up and been supported by them might clearly have been distrained at any time while they were growing there; and it seems to me, that the poles, which ought to have been removed with them, should reasonably be treated as in the same predicament, though it is by statute only that the growing crops are made distrainable.

The cutting of the poles was no injury to the tenant if the distress and sale were legal, because they were then the property of the buyer. The leaving the stumps in the ground was a consequential damage to the tenant, for which he would be entitled to a remedy.

I find no dictum or case in the books expressly in point, though, considering how extensively hops are grown in England, one would suppose that if the poles were held to be distrainable, some question might have arisen which would shew that there had been such chattels seized.

Paling does not stand on the same ground, because that is set in the ground with the intention of its continuing there permanently, or at least during the term. It is, however, annexed to the soil much in the same manner that the poles were, and I find in several cases posts and rails erected in the ground spoken of as fixtures which may be removed by the tenant. They were so treated in Fitzherbert v. Shaw, 1 H. B. 258. There is nothing, I think, laid down in Elwes v. Man, 3 E. R. 38, opposed to the view which I am inclined to take of the right of distress here, if we attend to the peculiar nature of these supposed fixtures; at the same time I am well aware of the distinctions in such cases, according to the relation in which the question presents itself, as for instance, between heir and executor, or for different purposes between landlord and tenant.

The case is not without its difficulties; I am not free from doubt upon it, but the best opinion I can form is, that these poles, placed in the ground only for a temporary purpose, and usually removed when the crop is taken, were not fixtures, so as not to be distrainable on that ground; that they might have been distrained while the crop was growing, or afterwards, not removable in the former case till the crop could

be removed, but removable in the latter case if the tenant insisted upon it or if the landlord chose, and in strictness removable at once from their position, though not off the premises as a matter consequent to the distress; that in ordinary circumstances they could have been removed without bringing them under that condition that it must be said they could not be restored in the same plight, and so not distrainable on that ground; because the things themselves, that is, the poles, could have been restored in the same plight; that happening to be seized during a frost which fastened them in the ground, cannot be said upon the evidence to shew an absolute impossibility to remove them without putting them in a different plight, that is without injuring the poles themselves, though the defendant chose to cut them rather than attempt the more difficult task of breaking up the frozen earth around them; and at any rate, I think we cannot recognize a change to be produced in the law by the accidental occurrence of a frost. Their proper place was not to remain in the ground for the purpose of the next year's crop, but to be piled or stacked on the ground ready to be set the next spring or summer : and if this be so, as I think it is, then I cannot say that they should be protected against distress by being left sticking in the ground, at a time they had no business there, any more than the tenant could privilege from distress or other article, as a rake, a spade for instance, by sticking it into the soil.

I think, therefore, that although there is no doubt the plaintiff was entitled to a verdict on the general issue, for the reasons which I have stated, yet that he has been allowed to recover damages which he ought not, on the assumption that the distress was illegal; and I must say, that even if the distress were legal, yet the giving damages to the amount of £125, when the whole of the poles sold but for £15, and cost no more than £45, was exceeding the just limit so far as ought to incline us, in a case where the right to distrain may well have been supposed to exist, to grant a new trial on that ground.

MACAULAY, J.—The term fixtures has various significations, and is, in the various treatises and cases on the subject, defined according to the light in which the fixtures are to be regarded. Generally speaking, it is said to be always applied to articles of a personal nature which have been affixed to the land; of such fixtures some become immovably annexed to the freehold, while others are removable by the tenant or go to his executors, and are therefore called respectively landlord's and tenant's fixtures; of the latter some are liable to be taken in execution, Amos & Ferrand on Fixtures, 261, 1 Q. B. 875; but not to be distrained for rent.—Amos and Ferrand, 256. In relation to the landlord's right to distrain, therefore, the test is, whether the articles seized were personal chattels, and if so, whether they were annexed to the land. - Amos & Ferrand, p. 2. In the present instance there seems no reason to doubt but that the hop-poles were chattels; and that the only point is, whether they were annexed to the land, so as to constitute tenant's fixtures, and as such (though removable by the tenant) not liable to distress, while they preserved the character of fixtures.

What then is meant by annexation? In Amos & Ferrand, p. 2, it is said to be necessary, in order to constitute a fixture, that the article should be let into or united to the land, or to substances previously con-

nected therewith; not merely laid upon or brought into contact with the land, but something more than mere juxtaposition, as, that the soil shall have been displaced for the purpose of receiving the article, or that it should be cemented or otherwise fastened to some fabric previously attached to the ground.—Elwes v. Maw, 3 East. 35; How v. Baker, 9 East. 215; Davis v. Jones, 2 B. & A. 165.

In Grady on Fixtures, p. 1, Fixture is said to be a term of ambiguous signification, and it is defined substantially in the same language as in Amos & Ferrand, i. e., things of a personal nature affixed or annexed to the realty, but which may be removed by the party who so affixed them or his personal representatives, without the consent of the owner of the freehold.—Hallum v. Runder, 1 C. M. & R. 276; 3 M. & W. 175. It is there further said, that the articles must be fixed in or to the ground, &c., and the cases are cited to shew what is and what is not a sufficient annexation.—1 Smith's Leading Cases, 187, 192; Simpson v. Hartop, Willes, 512; 2 Smith's L. C. 99, 114; Elwes v. Maw, 3 E. R. 38.

In 2 Smith's L. C. p. 114, the meaning of the term fixtures is also fully discussed in the note to Elwes v. Maw. Mr. Smith defines it more broadly as anything annexed to the freehold, meaning fastened to or connected with it. At page 122, the subject is further discussed by the American editors, in relation to judicial decisions in the courts of the United States, and the opinion taken as a whole is supposed to be, that in order to constitute a fixture, the union of some actual connexion with the freehold, with the adaptation of the chattel so connected to the general purposes for which the inheritance in the particular case is employed, is required.—Lawton v. Salmur, 1 H. B. 259, (a.)

Some cases seem to have made the possibility of removal without injury to the freehold a test of the chattel being a fixture, i. e., an injury from the mere act of removal independently of the subsequent want of the thing removed; but this has been in other cases considered as too narrow a ground on which to determine the question. And it seems very clear, that such tenant's fixtures as he may remove become so far a pledge for the rent, that whenever severed from the freehold to be removed, they then become liable to distress like other personal chattels.—Joule v. Jackson, 7 M. & W. 454; the principle of exemption is not to be extended, sed vide 6 Q. B. 897, per Patterson, J.

My first impression certainly was, that the standing hop-poles were not fixtures, so as to exempt them from distress for rent; but looking at the definitions given of a fixture, I do not see how that character can be denied to them.

It appears the plaintiff used a portion of the farm in the tillage of hop-plants, yielding a yearly product, and requiring the aid of the poles to sustain the hop-vines during the season of growth. It seems also, that these poles were set up for that purpose. Now it appears to me, that at midsummer, when these poles were entwined by the vines, the landlord could not at common law—and the case is to be decided by the rules of common law—have distrained them for rent. He could not have moved them to impound or to sell them, nor could a purchaser at the end of five days remove them, without causing the destruction of the hops and the loss of the crop. This seems inconsistent with the favour shewn by the law to implements of agriculture, and it is not a sufficient answer

to say, that the landlord might have also distrained the hops, and have allowed both hops and poles to remain in statu quo, until the former were ripe and the latter no longer of use, and then to remove both. This might do if the poles, like the hops, were renewed annually, but it is not so, the poles are required year after year; and though the statute 11 Geo. II., ch. 19, sec. 8, subjected the hops to distress, with leave to the landlord to pick and sell them when ripe, still hop-poles are not within the provisions of that statute, and if destrainable there seems nothing to excuse a postponement of their sale beyond the period limited by, or otherwise to exempt them from the statute 2 W. & M., sess. 1, ch. 5.—Pitt v. Shaw, 4 B. & A. 208.

It is true the hops were not growing in February, nor were the poles then in actual use, but they had been used the previous season, and were in a situation to render a similar service in the following summer; and certainly they were let into and affixed to the freehold. They were supported entirely by the soil in which they were set, as much as the posts of a fence, and seem, considering the mode of annexation and the purpose for which designed and used, to come within the definition of fixtures, according to the legal import of the term.—Statute 4 & 5 Vic., ch. 26, sec. 18.

Whether fixtures or not is often a mixed question of law and fact, and I am disposed to look upon the present as a case of that kind.—1 B. & B. 510. If the poles were obtained by the plaintiff, not off the landlord's premises, and having been set as they were, it was done with the intention that they should so remain from year to year, then (although I think the tenant might remove them) they were, so long as they continued in that state, tenant's fixtures, and not distrainable. But if it is usual to take up the poles each year to pick the hops, and if the plaintiff could not cultivate the plants the following season without taking them up, and only left them standing for want of leisure to remove them, there is much force in the argument that they were not fixtures, though left standing after the hop season was over; but still to hold them not to be fixtures is a construction of law against the fact, for in fact they were fixtures as much as the rails of a fence round the hop field would have been. It is very much like the case of double windows set up and removed periodically.

The action of trespass for breaking or entering the close would seem to lie, even if the poles had been legally distrained and sold. They were seized and sold in the middle of February, and in April the defendant's servant entered and cut them down, leaving the stumps encumbering the close; and although a landlord or other person purchasing goods distrained for rent, and impounded and sold on the close, has license by the statute 11 Geo. II., ch. 19, sec. 10, to go to and from the premises in order to carry off or remove the goods so purchased, and to shew the same under the general issue, see 21, still I apprehend this privilege must be exercised within a reasonable time. - 4 B. & A. 208. And the time seems unreasonable from the 15th February to the month of April; nor do I consider the plaintiff's letter of the 22nd of March a waiver or license to the defendant to enter and take the poles in April.-Williams v. Morris et al., 8 M. & W. 488; Wood v. Mauley, 11 A. & E. 34; Wood v. Leadbitter, 13 M. & W. 838; 2 Lord R., 1424; 1 Stra. 717; 11 E. 395; 2 B. & B. 362; 2 C. & P. 374.

With respect to the poles that had been taken up and were lying on the ground, I do not understand that they are included in the verdict, and therefore whether strictly entitled to be regarded as fixtures or not, seems immaterial at present.

As to the amount of the verdict, enhanced as it is by consequential damages specially laid, (a) it seems to me to be unreasonably large, and as the facts were imperfectly shewn on the last trial, I concur in granting a new trial on payment of costs. When again tried I should like to have it ascertained whether these hop poles were cut on the demised premises or not? How long they had been standing? Whether hops had been picked the previous year without removing them? Whether they were left standing for want of leisure, and must have been removed in the spring to enable the plaintiff to dress the hop-hills? Or whether it was intended that they should continue as they were during the coming season? In short, what is the course of husbandry?

McLean, J.—There seems to be no doubt that the defendant would be liable to an action of trespass for entering on the lands of plaintiff, so late as the 26th of March, to remove property sold for rent on the 15th February preceding. He was bound to remove such property as soon as possible after the sale, within a reasonable period, and was not at liberty to take down fences and to enter at so late a period for that purpose; but for such a trespass only nominal damages should be recovered, there being, in fact, no actual damage done by the entry. If the standing hop poles were distrainable, then the damages should have been confined to the entry on the land, though special damage is charged on account of leaving the stumps of the poles in the ground.

It was not shewn that the plaintiff sustained damage in consequence of their being so left, or that he had ever removed them; but from the evidence it appeared that plaintiff, during the summer after the seizure, had apparently abandoned the hop-yard, which was then overgrown with thisties and weeds; and he endeavoured to establish special damage in being deprived of the use of the hop-yard from the want of poles, which he contended could not be got after the latter part of March. If the hop-poles which were in the ground were not distrainable, the plaintiff was of course entitled to recover their value; but he should not have been allowed to go into evidence of probable loss from the want of the poles and inability to procure others. Such loss might or might not occur, and to be found a claim for damages, it should appear that such damages were inevitable from the defendant's act. The plaintiff, had the poles not been removed, might not have cultivated the hop-yard, and if he had, the crop might have been bad and not remunerating, even for the expense of cultivation; to assume, therefore, that the plaintiff would have cultivated the hops, and that the crop would have yielded large profits, seems quite too uncertain a mode of computing damages. It does not appear that any objection was made on account of such evidence being received, and even now it is not made a ground of objection to the verdict The only question now raised is, whether the hoppoles were or were not distrainable, and the verdict is objected to on the ground of excessive damages.

⁽a) 1 Stra. 172; 7 C. & P. 804; Davis v. Oswell, 8 C. & P. 703; 4 A. & E. 493; 1 M. & G. 222; 3 B. & A. 470.

If the poles had been all detached from the earth, this question could not have arisen, as they would undoubtedly be chattels, and as such liable to distress for rent, or seizure on execution; but being inserted in the ground for agricultural purposes, and being indispensable for the purpose for which they were inserted, it is contended by plaintiff that they were, for the time being, attached to the freehold, and could not legally be separated from it for the purpose of being distrained or removed. The hops grown and attached to the poles might be distrained at any time for rent in arrear, but could not be appraised or sold till ripe, as till then the value could not be ascertained; but if the poles, which are set deeply into ground to support them, are distrainable, they must be so at all times, and the mere circumstance of their being in use to support the hops could not protect them from seizure.

It will not be contended that while attached to the freehold and necessary for the cultivation and proper enjoyment of the hop-yard, they could be distrained; but it is alleged, that in this case the poles were not in use; that the usual course of cultivation is to take down such poles in the autumn, and that being left standing in the ground in the month of February, for no purpose then connected with agriculture, they must be regarded as chattels and liable to seizure.

Being let into the ground to a considerable depth, for the express purpose of cultivating and growing hops upon them, and being at the time of the seizure and sale remaining in the ground, apparently with a view to their being used for the same object the following season, I do not see how they can be considered as detached from the freehold, so as to be liable as chattel property to distress. It is true, as appears by the evidence, they were remaining in the ground contrary to the usual course of good husbandry, but that fact cannot make them liable to distress. The plaintiff had a right to depart from the usual course in such cases in the cultivation of his hops, and he might have considered it more advantageous to leave the poles in the ground than to remove them.

If in this country rails are laid up in fence and ground enclosed, a landlord cannot seize such rails for rent, nor can a sheriff take them in execution, because they are necessary to the enjoyment of the ground, and it does not rest with any one to say that they were unnecessary at the particular time or place, and therefore should be liable to seizure. If, however, the rails were lying in heaps on the ground, not actually in use for any agricultural purpose, they would, as it appears to me, be liable to seizure and sale as chattels.

I do not see that any distinction can be drawn between poles put into and remaining in the ground for agricultural purposes, and necessary for the enjoyment of the ground in raising the particular crop which they were intended to support, and an ordinary fence or paling put up also for the purpose of agriculture and for the better enjoyment of the land. If hop-poles could be regarded as distrainable, as I have already said, I do not see why they might not be seized and sold at any season of the year, and if liable to be sold then, it would be encumbent on the purchaser to take them away within a reasonable period; but he could not take them without destroying the growing crop, and must therefore wait till the crop should come to maturity and be secured; so that though a purchaser is usually entitled to the immediate possession of goods sold for rent,

in the case of hop-poles a purchaser would not be able to remove them, but must leave them to support the crop of another person, till that crop arrives at maturity. I do not think the liability of poles of this description to distress can depend upon there being a crop growing and clinging to them at the time, or upon the state of that crop; they would be equally liable whether the crop was just springing from the ground, or had arrived at maturity.

After the best consideration which I have been able to give to this case, I think the standing hop-poles must be regarded as agricultural fixtures at the time they were cut down and carried away, and so not liable to be distrained or sold. The circumstance of their being frozen in the ground at the time cannot, as it appears to me, make any difference; they were equally attached to the freehold before the ground became frozen. Had they merely been set up on the surface of the ground without being let into the soil by manual labour, the case would be different.

As to the ground of motion for a new trial for excessive damages, I certainly think it well founded. The conduct of the defendant, either before or after the sale does not appear to have been in any respect harsh or oppressive. He was levying for rent actually due, and which he could not recover otherwise, and after the sale of the poles they were offered to the plaintiff for what they were sold at, and refused by him, though the amount was only one-third of their value as proved on the trial.

The damages were probably enhanced by the evidence as to the profits of which plaintiff was deprived by the want of the poles during the ensuing season; but when it was proved that he might have had these very poles back again for the sum of £15, it seems absurd that damages should have been increased by such a consideration.

On the ground of excessive damages, therefore, I think a new trial should be had; but as I do not see there was any misdirection on the part of the learned judge who tried the cause, or if there was any, it was in favour of the defendant in reference to the entry on the land; and as no objection seems to have been taken on the score of the reception of improper evidence, the new trial must be on payment of costs.

DRAPER, J.—A distress was at common law a pledge, taken out of the hands and possession of the tenant by the landlord, and kept by the latter until the tenant entitled himself to get it back again—as by replevying or by discharging the duties incident to his tenure.

Hence only moveable goods and chattels could be taken; and this is the foundation of one rule of the common law, that nothing affixed to the freehold could be distrained.

The right of the tenant to get back the things distrained was a right to receive them, without deterioration, in as good condition or plight as they were when the landlord took them.

Hence another rule, that nothing could be taken but that which was in its nature capable of being so restored—a rule which, until the stat. 2 W. & M., ch. 5, exempted sheaves of corn loose, or in the straw, or hay in a barn, hovel or stack, from being taken as a distress; which statute Lord Kenyon treats as not having taken away privileges from distress.—4 T. R. 567.

The statute 2 Geo. II ch. 19, modified the first rule, by subjecting certain growing crops to be distrained, and when ripe, to be cut, laid up appraised and sold on the premises, by the distrainor—and for these latter purposes, and to take away from the premises—when sold, gave a right of entry and egress to the distrainor, purchaser, &c.

The statute of William and Mary gives the immunity of sheaves of corn and hay from distress, as the reason for the change of the law in respect to these articles made by the 30th section. And Lord C. J. Abbott states that fixtures were "not distrainable, not being severable "from the freehold, and for that reason not being capable of being restor-"ed in the same plight in which they were before severance. And for the "same reason, before the 11 Geo. II., growing corn could not be distrain"ed."—Pitt v. Shew, 4 B. & A. 206.

This latter act authorized the impounding on the premises of all things distrained upon, but it did not "alter the common law in points which it did not touch."—Darby v. Harris, 1 Q.B. 898-9. The reason for not distraining things which could not be restored in their original plight, was more apparent in former times, when the landlord was obliged on distraining to remove the distress from the premises;" but the reason remains.

To decide the principal question in this case, it must therefore be enquired, 1st. Could the Landlord before the stat. of W. & M., have distrained and taken away these hop-poles under the facts proved fundly. If not, have either of the statutes referred to given him the power so to do?

As to the first question, I do not perceive any solid argument by which hop-poles planted in the ground and there standing, can be said not to be fixtures-at all events, while the hops are growing, and attached to them; nor have I been able to satisfy my own mind, that because the statute of Geo. II. authorizes the seizure of corn, &c., " or other " product whatsoever which shall be growing" on the premises leased, t therefore enables the landlord to seize the articles affixed to the freehold, and necessary for the growth, protection or bringing to maturity such product of the soil, together with the product itself. The immunity from seizure, of fixtures, does not depend, in my opinion, upon their being actually in use, but upon their being annexed to the soil. If really so annexed, for the purpose of their ordinary use, and especially if requiring to be so annexed in order to be of that use, they cannot be deprived of the character thereby acquired otherwise than by severance, and that severance cannot be made by distraining, though if severed before, they would be the subject of distress. - Lane v. Dixon 11 Jur. 89.

Nor do I perceive that the statutes alter the case. Hop-poles do not fall within the description of articles to which by either statute the landlord's power of distress is extended; nor can the power given by the latter act, of impounding on the premises, make any difference—it leaves the question where it was before. "Impounding" does not mean leaving things all over the farm, where they are found, affixed to the soil; it implies a present power of removal from the place of seizure to a place of security—a bringing together of things seized in different places.—11 Ea. 405, anote. The language of the stat. 2 W. & M. rather affirms

this view, by enacting that shocks of corn, &c., should be locked up and detained in the place where the same were found, for or in the nature of a distress; avoiding the term impounding, which in distress before that act was used to signify putting beasts and living things, taken as a distress, into a pound overt, where the owner could have access to feed them; or putting things dead (otiosa), which would suffer by exposure, into a pound covert-in neither case (at common law) on the premises where the distress was made. Impounding is a distinct act from distraining, as a tenant may tender rent before impounding and after distress, though such tender comes too late if impounding has taken place; and this distinction applies to goods taken for rent, as well as to cattle distrained damage feasant .- Vertue v. Beaslev, 1 Moo. & Rob. 21; Ladd v. Thomas, 12 A. & E. 117. If it be argued, that any other impounding than that of leaving the hop-poles in the very place where each was seized as a distress was impossible, that argument, to my mind, proves too much, for it establishes rather that they were not distrainable, than that such a seizure and leaving amounted to impounding, even under the statute of Geo. II. At common law, such an implied impounding is clearly out of the question. Either therefore by reason of the impossibility of removal without detriment, or because of the annexation to the freehold, it seems to me these hop-poles were not distrainable. The fact that at the moment of seizure the poles were not distrainable. The fact that at the moment of seizure the poles were not standing in the ground, serving the purpose of husbandry, does not do away the fact that they were standing on, and affixed to the ground, unless indeed the rule be, that fixtures to be protected from distress, must be in present ordinary use in the purpose for which they were put up. I find no authority for holding, that this gives the power of severance to the landlord, even though if the tenant had severed such fixtures, they might be immediately distrainable. Having been once annexed to the freehold for a legitimate purpose, they are, in my opinion, protected from distress while they retain the character of fixtures thus given to them by the annexation.

Being therefore of opinion that there was no misdirection, I think the rule for a new trial on this ground is not sustained. On the ground of excessive damages, I think there is sufficient reason for submitting the case to another jury, and am therefore willing to concur in a new trial being granted on payment of costs.

JONES, J., being in the Practice Court during the argument, gave no judgment.

Per Cur.-New trial on payment of costs.

SCOBELL V. GILMOUR.

The court will not set aside an award upon an affidavit of merits alone, except upon manifestly clear and strong grounds.

Querre, as to the degree of certainty required in the statements of facts, which would

induce a court to set aside an award upon the merits?

McLean J., dissentiente from the rest of the court deciding that the facts disclosed in the affiliavit in this case were sufficiently stated to warrant the court in setting aside this award.

The defendant moved to set aside an award. 1st. Because the declaration in the case referred to, contained only accounts for money had and received and an account stated, the issue thereon being nonassumpsit; and that the plaintiff produced before the arbitrators a collateral guarantee by the defendant of the debt of a third party on a certain contingency, which cause of action required to be specially declared upon.

andly. That the plaintiff having given no proof of an account stated, and having only proved £2,441 money had and received by the defendant to the plaintiff's use under the said guarantee, and having admitted a balance of £3,566 due from Hackett & Co. to the defendant in 1841, when the guarantee was made, ought to have been nonsuited.

3rdly, That the evidence of the valuation of certain schooners and barges was no evidence of money had and received.

4thly. That it was not proved that the debt of Hackett & Co. to the plaintiff was extinguished, without which the defendant could not be liable as for money had and received.

5thly. That the award is against evidence, because the defendant proved a balance and claims due to him from Hackett & Co., after allowing for the proceeds of all sales made by him of Hackett & Co.'s property.

6thly. That the award allowed interest to the plaintiff on the amount due to him by Hackett & Co., and charged it against the defendant on his guarantee; whereas interest could not be recovered in such a case under a count for money had and received.

7thly. That the umpire exceeded his authority, by ordering judgment to be entered in the cause on a day certain previous to the expiration of the first four days of the following term. Rule moved with costs.

A verdict by consent had been taken for the plaintiff for £1,163, subject to the award of arbitrators.

The arbitrators disagreed and appointed an umpire, who awarded £1,179 4s. 1d. to be paid to the plaintiff, which was composed of £874 9s. 2d., which he considered to be the balance due by Hackett & Co. to the plaintiff, and £304 14s. 11d. for interest on that balance.

Mr Geddes, the defendant's attorney, made affidavit, that the debts proved to be due from Hackett & Co., to the defendant far exceeded the monies realized by the sale of all the property that had been transferred to him by Hackett & Co.; and that their agreement in writing of the 20th of January, 1841, which was produced by the plaintiff, was as follows, addressed to the plaintiff: "agreeable to the understanding between Messrs. E. Hackett & Co., and yourself, we hereby promise to pay over to you, towards extinguishment of your claim against them, whatever surplus may remain in our hands over and above the balance and claims due to us by Messrs. Hackett & Co., after we shall have realized any sales we may make of the property acquired by us of Messrs. E. Hackett & Co.

The submission was by rule of reference at Nisi Prius, and was of "all "matters in difference of the cause."

Sullivan, Q. C., with whom was Breakenridge of Kingston supported the rule to set aside the award, and cited in support of the objections mentioned above, 14 L. J. Exch. 160; 12 M. & W. 309; 2 Bing. N. C. 77; 7 Bing. 254; McL. & Y. 200.

Cameron, Sol-Gen., shewed cause, and cited 7 Law Times, 88; 3 B. & Ad. 95; 1 M. & G. 976; 15 L. J. 263; 8 Law Times, 393-534: D. 5 U. C. Q. B.

I Q. B. R. 107; I D. & Ry. 366; 3 Dow. 220; 9 Dow. 341; I Price, 89; 13 Price, 533; II Moore, I; 5 Dowl. 755.

ROBINSON, C. J.—There may probably be injustice done to the defendant by this award, and to a considerable amount, but I am of opinion that we cannot set it aside, and for two reasons. 1st. Because the whole course of the courts, both of law and equity, in dealing with awards, is such as to preclude us, except under clear and extraordinary circumstances, from going into a consideration of the merits after the arbitrators have awarded upon them, 2ndly. Because if a greater latitude were allowed to us in this respect, yet the facts stated do not shew conclusively that the award cannot be a just one. The affidavits in support of the rule, I mean chiefly that of Mr. Geddes, which goes into a particular statement of the circumstances, are drawn with great precision and clearness, and place the facts, so far as they are stated, very distinctly under the view of the court. The point in which it fails to give material information, is one on which it could not perhaps have been explicit with advantage to the defendant's case, unless it gave a colouring to the facts which the truth might not have warranted. The most material question regards the two notes for £1500 and £1000, endorsed respectively by Mr. Ferry and Mr. Bradbury; whether they had been received as payment of Hackett & Co.'s account pro tanto, or were clearly understood between them and the defendant Gilmour to be merely securities to back so much of the amount, leaving the whole still an open account for which Hackett & Co. were all the time liable. Now this is a point on which the affidavits are not full and explicit, not enough to enable us to say that the award may not be quite just in refusing to admit this £2500 as a debt due by Hackett & Co., and coming within the understanding of the parties when the arrangement of 20th January, 1841, was made,

Indeed, the parties may be supposed to have had a tolerable idea of what the lands and barges and schooners, which had been assigned to the defendant, would probably realize. It would seem almost absurd to suppose, that the plaintiff could have thought it any advantage to make such an arrangement, as the writing of 20th January, 1841, specified, if the amount of these notes was to be added to Gilmour's other debts against Hackett & Co., since there could have been no prospect of any surplus.

If there could have been any hope of our being induced to interfere on the ground of merits, the real nature of the transaction respecting these notes should have been more clearly explained. It seems they have been put in suit against the indorsers, and it is not shewn that the defendant is not likely to succeed in collecting them in that manner; but at any rate, they may, for all we see, have been agreed to be received by Gilmour in discharge of so much of Hackett & Co.'s account. Such arrangements are very common, and it is not sworn that this is not one of that kind; in which case, or if the circumstances were at all equivocal, the arbitrators might well have declined to add the amount of those notes to the amount of Hackett & Co.'s liabilities, which were to be discharged before any sum could be payable to Scobell; since that must inevitably have shut him out from receiving anything, and could hardly have been the arrangement contemplated by the parties.

It is urged, that even excluding these notes from Gilmour's claim, the

award directs a larger sum by some hundred pounds than was shewn to be remaining in Gilmour, hands after retaining what was clearly due to him; but then that assumes, that the arbitrator was clearly bound on the evidence to admit the £259 charge for salt, alleged to have been omitted in the defendant's account before rendered against Hackett & Co., which we might not find to be clear, if we knew all that was provedto him, and admitted and stated by the parties. He would naturally be jealous in allowing additional items to be imposed on the account, in order to diminish the surplus after the arrangement had been made. With regard to interest, it may be quite true, that in a court of law it would not have been held right, to instruct a jury to allow interest on the balance remaining in Gilmour's hand for the use of Scobell, under the circumstances of this case; and yet it would not follow, that if an arbitrator should think it just to allow it, his award should for that reason be set aside. Badger's case, 2 B. & Ald. 692, is an express authority against courts interfering on such a ground; and there would be no just pretence for it, because during the term for which the interest has been allowed. the balance, which ought to have been paid over, was lying in the defendant's hands, and, as may be supposed, either did produce interest or an advantage equivalent.

As to the cause of action not being such as could have been admitted on the common counts: it certainly is not a case of guarantee, as the objection assumes; still it might in strictness have been held at law, that the plaintiff should have declared specially upon it. It was, however, in substance, for money had and received to his use, that the plaintiff was claiming. It was the only transaction between the parties; and unless both parties intended to submit this matter of account to the decision of the arbitrators, the evidence was wholly nugatory. And they did both go before the arbitrators with this case, being the only thing in dispute between them.

It is to be regretted if any error has been committed by the arbitrators to the prejudice of the defendant, and especially to a large amount. There is reason to apprehend that it may be so, but it is not certainly made out; and the circumstances must be so clear and so particular, that would authorize the court in interposing on the ground of merits, that we cannot venture to do so, merely because there may be something unsatisfactory in the evidence.

The case of Hall v. Duffy et al., in this court, Trinity Term, 1835, was one in which we were very reluctant to allow the award to stand, but we found that we could not interfere, unless we acted in disregard of well established principles which govern the courts in England, and acted in regard to the award upon principles which apply only to new trials.

The court of course has the power, when they see it right to exercise it, but on the ground must be distinctly made out, and it must be clear and strong.

If the effect of the award would be so evidently unjust and unreasonable, on the facts appearing, as to afford strong ground for imputing corruption or partiality to the arbitrator, the courts have sometimes given relief on that footing, but then the award must be impeached for misconduct in the arbitrator. It is not so in this case.

MACAULAY, J.—The affidavits filed upon this application represent,

•	
1. That the lands assigned by Hackett & Co. to defendant	
realized (a sum exceeding the consideration mentioned	
in the assignment)	£2920
2. That the barges produced	1075
3. That the schooners produced only	485
In all	£4480
But the consideration expressed in the assignment of	
the barges was £1750	
And for the schooners 1000	

2750	
Which if added to the lands 2920	
Would equal £5670	

Being £1190 more than the sums admitted by the defendant, of £4480, and amounting together to £5670.

The umpire may have rejected the claim of £259 for salt, omitted in the defendant's account, and also more or less of the £78 2s. 6d. claimed for expenses. He may likewise have been satisfied that the defendant ought to be charged with the receipt of a sum exceeding £4480.

The plaintiff may also have effectually resisted the defendant's *claim* to recharge the promissory notes for £2500, previously credited in account to Hackett & Co., as having been accepted in satisfaction and secured by indorsers, or on other grounds not appearing.

The evidence on which he acted is not before us, and without it we cannot see (whatever we may conjecture) on what principle he acted, or whether he erred in his conclusions of fact or of law, or in the exercise of his judgment on the case as laid before him.

We do not know to what amount the defendants were held responsible, as having received monies under the assignment, or in what particulars their claims were rejected or abridged. We do not perceive what the understanding between the parties, as mentioned in the written undertaking of the defendants, was; and without a full knowledge of the whole case, it is impossible to form any satisfactory judgment on the merits.

The cases referred to in Billings on Awards, p. 57-8 and notes, and Armstrong v. Marshall, 4 Dow. P. C. 595; Huntig v. Ralling, 8 Dow. P. C. 879; 3 Dow 200, shew that the arbitrator or umpire is now held to be the judge of both the facts and law, whether a professional person or not; and the case of Ferguson v. Hall, in this court, and the cases there cited, and others cited in the argument of this case, shew, that where the award is good on the face of it, the court cannot exercise any appellate jurisdiction, or investigate its merits on affidavits. In this respect awards differ from verdicts of Nisi Prius.

The cases are very numerous—9 Bing. 679; 4 A. & E. 347; I Bing. 104; I Q. B. 107; 2 Dowl. 651; I D. & L. 465; I Price, 89; I3 Price, 533: II Price, 57; 9 Dow. 34I; 3 Dow. 220; I8 Ves. 449; I B. & B. 363; 3 Moo. 687; Tidd. 894; Io Jur. 1057; 2 Sale, 197; 3 Scott, N. S. 250: I Sal. 71, and ib. note; I Str. 30I And. 297; I Barnes, 4I; 3 Atk. 529; 2 Burr. 70I; Vin. Ab. 132-3,

pl. 8; 2 T. R. 781; 2 Vernon, 251, 705; 9 Ves. 364; 3 Ch. Rep. 49; 1 Saund, 327, d.; 1 Taunt, 48; 6 Taunt, 255; 3 Moo. 241; 1 Ves. Jr. 365; 1 Mar. 471; 6 Taunt. 111-14; 3 A. & E. 234; 8 Ves. 364; 2 Dow. 259; 5 M. & S. 504; 4 Dow. 595; 2 M. & G. 847; 12 M. & W. 309.

Now the deduction from all these cases seems to be, that if good on the face of it, the court cannot review the decision of the arbitrators on the merits: or look into the merits dehors the award, with any other view than to investigate the misconduct of the arbitrator, when misconduct is imputed to him.

When on the merits his award is shewn to be so notoriously against justice and his duty as an arbitrator, that the court can infer misconduct on his part—13 East. 358; 2 J. & W. 259—or corruption or gross mistake admitted by him—I Ves. 369—or a perverse misconstruction of the law or other misconduct—5 M. & S. 504—or almost to misconduct—2 Dow. 651—or a mistaken judgment equivalent to a mistake in law, when he was bound, or shewed an intention to follow the law—Tidd, 894, or the like, the courts will grant relief by setting aside his award; but they have with great steadiness disclaimed all authority to review his decision, either on the law or facts, upon the merits in the exercise of any appellate jurisdiction, and refused to enquire thereof, except with the collateral object of determining upon the conduct of the referee.

And although cases are mentioned, in which the court has called on arbitrators to state their grounds of decision—Ainsley v. Goff; Kidd on Awards, 351; Alder v. Saville, 5 Taunt. 454—yet it has been very sparingly done, and at present, if with any inquisitorial object, it seems quite admissable,

Misconduct is not in terms imputed to the umpire in the present instance; the objection is, that his award is against evidence; but were it rested on the footing of gross mistake or palpable error, touching the facts, the law or the merits, sufficient to evince a perverse judgment, or to establish an ignorance or negligence or wilfulness amounting to error in law, misconduct or corruption, I am not able from what is laid before us to hold such incapacity or misconduct established.

No mistake is alleged, nor does the evidence on which he acted appear from any minute or report of his; nor is it alleged that the award is other wise than as he intended it to be on the whole merits of the case. It may be conceded, that according to the affidavits filed on the part of the defendants, the notes for £2500 constituted prima facie claims on their part, and which they were entitled to charge in addition to the balance of their account, against the proceeds of the effects of Hackett & Co. which they had received; and it may be inferred that on some ground or other the umpire disallowed such claim; but upon what facts or evidence, or on what arguments or view of the law, we cannot safely presume, whatever we may conjecture.

That questions of difficulty, touching either the law or the merits, arose, may reasonably be inferred from the fact, that in some points of difference or other the two professional gentlemen who were appointed arbitrators could not agree; and the umpirage is only the judgment of a third person, after a conflict of opinion by the two others. But in what the difficulties consisted, or on what principles they are adjusted,

is not apparent. They may have grown out of the understanding between the plaintiff and Hackett & Co., spoken of in the written undertaking, or in the receipts for which the defendant was accountable, or the claims which they urged, or all of them, though the notes for £2500 probably formed the most prominent topic of controversy.

On some grounds, not appearing in the award, the umpire awarded a large sum to the plaintiffs, and without knowing the evidence on which he acted, and the principles by which he was governed, it is impossible to estimate the propriety, equitableness or justice of his decision. The affida vits filed are certainly calculated to create a serious apprehension that justice has not been done; but such injustice, if it exists, is not established in a way that entitles the court to review his decision or to set aside his award. How he arrived at his conclusion he has not informed us, nor can we distinctly perceive; and whether he erred in fact or in law, or exercised an unsound or impure judgment, we canuot with certainty determine; and unless satisfied that he displayed gross ignorance, or exercised a judgment palpably unsound or perverse and amounting to misconduct, I do not see that we are, according to the adjudged cases, at liberty to disturb his award.

As to the question of interest, its allowance has probably much enhanced the amount of the award; but it seems clearly within the province of the umpire to have allowed it to the one, and charged it against the other.—2 B. & A. 691; 5 Dow. 755; 2 Bing. N, S. 77.

JONES, J.—The question is, whether the award for the plaintiff shall be set aside, upon an alleged error in the arbitrators, in finding for the plaintiff upon evidence not applicable to the counts in the declaration, which were for money had and received and on an account stated.

The defendant contends that the plaintiff could only have recovered at law (if at all) upon a special count in assumpsit.

With the merits this court has nothing to do, except in so far as they shew misconduct or corruption in the arbitrator, which is not charged.

In Armstrong v. Marshall, 4 Dow. 595, Patterson, J., says that "the "arbitrators are judges of all matters of law and fact, and the court will not interfere unless a matter of law is raised by the award."

In Perryman v. Steggall, 9 Bing. 679, Lord C, J. Tindal says, "When parties appoint a barrister an arbitrator, they appoint him a judge of the "law as well as the fact, and it has been the practice to refuse any appliment on the merits of the decision."

In Lancaster v. Hemington, 4 Ad. & Ell. 345, Lord Denman, C. J., says, supposing the arbitrator has mistaken the law, he has stated nothing in his award which shews him to have done so. Then, if there has been any mistake, it is one which we cannot arrive at without going into the merits."

In Jupp v. Grayson, 3 Dow. 200, Lord Lyndhurst says, "there is no "reason for a distinction between a legal and non-legal arbitrator."

In Ashton v. Poynter, 3 Dow. 201, the language of the court is, "I am at a loss to find any distinction between a legal and a non-legal arbitrator, and that an award made by the latter may be impeached in a point of law, though not that of the former; to support such a distinction, you must infer that both the parties intend that the arbi-

"trator should decide according to law, when they know that he has no "knowledge thereof. Jupp v. Grayson, has decided the point."—r C. M. & R. 520.

In Huntig v. Ralling, 8 Dow. 879, Parke, Baron, says, "the distinction between a professional man and a non-professional man is abandoned, and when parties refer they must abide by the decision of the "arbitrator."

The case of Ching v. Ching, 6 Ves., jr., is the first case in which the distinction was disregarded. "Where the merits in law and fact were referred to a person competent to decide upon them, we will not open an award, unless it be shewn to be so notoriously against justice and his duty as an arbitrator, that we could infer misconduct on his part." Per Lord Ellenborough, in Chace et al v. Westmore, 13 East. 357, Le Blanc, J., added, that "when the question of law necessarily arises upon the face of the award, then the court must take notice of it."

In Richardson v. Nourse, 3 B. & Ald. 239, Abbott, C, J., says "this is a reference to mercantile men, and they may have decided the question upon merchant usuage. I do not go the length to say, that where an arbitrator proceeded upon a mistake of a clear principle of law, that the court will not set aside an award." Holroyd, J., "the court will not set aside an award on the ground merely that an arbitrator is mistaken in a point of law, but the court must be clearly satisfied that he could not have made such an award if he had known what the law was."

Now I am by no means certain, in this case, that if the umpire had known the law to be what it is intended to be on the part of the plaintiffs, he would have come to a different conclusion.

In Cramp v. Symons, r Bing. 104, it was held, that even where matter of law alone, and no matter of fact, is referred to a barrister, the court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear upon the face of the award.

In Symes v. Goodfellow, 2 Bing. N. C. 532, in an action of assumpsit against the defendant, for the board of his wife, and non-assumpsit pleaded, the case being referred to a barrister, the arbitrator admitted evidence of adultery on the part of the wife, and found for the defendant. On a motion to set aside the award, it was argued, by the counsel for the defendant, that the admissibility of the testimony was a matter of law in which the decision of the arbitrator was final, and had always been so held where the arbitrator was a barrister; and that by Jupp v. Grayson, 1 C. M. & R. 523, that rule was now extended to the award of a lay person Tindal, C. J., says, "the admissibility of the testimony" was a question of law which has been decided by the arbitrator. You "must take his law for better and for worse."

In re Hall v. Hinds. 2 M. & G. 847, the court set aside an award upon the ground of misconduct in the arbitrator, in deducting a sum, which should have been added to another admitted to be due from Hall to Hinds. The error was a mere clerical one; but the court considered the error so gross that it amounted to misconduct, although there was nothing morally wrong in the arbitrator.

But in Phillips v. Evans, 12 M. & W. 308, a case very like the last, the court refused to interfere, carrying the doctrine of non-interference

much further than had been held formerly, and much further than I would be inclined to go without express authority.

In Boutillier v. Thick, I Dow. & Ry. 366, the court decided, that when matters of law and fact are referred to an arbitrator, his award is final and conclusive. If he is silent as to the law, we cannot interfere, though he be wrong.

In Payne v. Massey, 9 Moo. 666, where the arbitrator allowed interest, when by law it was not recoverable, the court refused to set aside the award; referring to the case of Boutillier v. Thick, and Cramp v. Symons, I Bing. 104.

In an anonymus case, I Ch. 674, the court after much deliberation aid it down as a general rule in cases of this nature, that they could not suffer the legal principles upon which an arbitrator decided to be discussed, unless these principles appear to be distinctly stated on the face of the award. If an award is expected to be founded in a questionable principle of law, the parties ought to apprize themselves beforehand of the principle, and request the arbitrator to state it on the face of the award, in order that thereafter they might have the question discussed. In this case that had not been done; and therefore, supposing the umpire to have been erroneous in his view of the law, the award could not be set aside.

In Gensham v. Germain, 11 Moore, 1, "the award is conclusive, there being nothing on the face of it to warrant the objection. Affidavits cannot be received to shew what particular charges have been allowed."

In Jay v. Byles, 3 M. & S. 86, the arbitrator according to the submission set out upon his award the objections taken to the right of recovery by the plaintiff; and on application to refer back the award to the arbitrator to state the facts upon which the questions of law arose, the court refused; and thereupon application was made to set aside the award, on the ground of error in point of law in the arbitrators decision, the rule was refused, there being nothing erroneous upon the face of the award.

The case of Jones v. Corry, 5 Bing. N. C. 187, is a case in which the court interfered to set aside an award, upon a mistake in the construction of the rule of reference, which did not appear upon the face of the award. But it was shewn to the court upon the statement of the arbitrators, made after the award for the purpose of enabling the party to make an application to the court.

Chace et al. v. Westmore et al. 13 E. 357, which is very like the present, establishes the principle of interference with an award in regard to the merits, which has been followed in most of the cases to which I have referred.

Upon a review of all the cases, I think the court should not set aside the award upon the ground that the evidence was inapplicable to the declaration, or upon the ground that the umpire allowed interest to the plaintiff, I cannot say that justice has not been done between the parties—and the court, under the authorities cited, ought not to entertain the objections to the award. The two arbitrators chosen by the parties were barristers, and they selected an intelligent layman, a man of business as the umpire.

It is impossible to say what the evidence was, and that it was not

sufficient to support the action for money had and received, or upon what ground the arbitrator rejected items charged by the defendant, if we could with propriety enter into the merits. There is no charge of impropriety of conduct on the part of the arbitrators or umpire.

McLean, J.—As to the first objection, that the guaranty should have been declared upon. Had the suit gone on at Nisi Prius, it is most probable that the objection would be entitled to prevail; but the parties having chosen to put themselves on the judgment of arbitrators of their own choosing, on the question raised on the record, viz., whether defendant had or had not received any money to the plaintiff's use, I do not think the arbitrators or umpire were bound to reject all but such strictly legal evidence as would be admissible at Nisi Prius. Besides the parties, well aware of the object of the reference, went into the accounts for the purpose, on the one side of establishing money had and received, and on the other to shew that no such claim existed. It is too late therefore, as it appears to me, to raise this objection now, after each has taken his chance of a judgment in his favour by the arbitrators or umpire.

The second objection is, that plaintiff should have been nonsuited on his own evidence, having shewn only the sum of \$2441 received by defendant to the plaintiff's use under the guaranty, and the defendant's account (to be first satisfied) being admitted to be £3566 14s. Id. It is not, I suppose, intended to be admitted, that the sum of £2441 was received to the plaintiff's use; if that were so, it would put an end to all question, as the award is within that sum. That was the whole amount proved by plaintiff to have been received, but as defendant was entitled to pay his own demand before he should become liable on his undertaking to plaintiff, and that demand far exceeding the amount received there could at the close of plaintiff's testimony have appeared, so far as may be judged from the affidavits filed, no money had and received to the plaintiff's use.

The arbitrator or umpire by the reference had no authority to direct a nonsuit to be entered. If the award was in favour of defendant, then judgment was to be entered for defendant for costs only, so that the motion for a nonsuit to be entered seems to have been properly rejected.

As to the third objection, that the evidence of the valuation of schooners and barges was no evidence under a count for money had and received. I am unable to see now it applies. In the affidavits it is shewn that the defendant proved the amount received for the schooners and barges received from E. Hackett & Co., and it is not objected or alleged, that the umpire took the valuation made by any witness for plaintiff, instead of the actual amount realized.

The 4th and 5th grounds of objection may be considered together being, that it was not proved that the defendant's claim, or rather the claim of Wm. Ritchie & Co., defendant's firm, against E. Hackett & Co., was ever extinguished, which was necessary to make defendant liable for money had and received; and that the award is contrary to evidence in this, that the defendant proved a balance due to him from E. Hackett & Co., after allowing for all the proceeds arising from sales of property received from them.

The umpire in this case seems to have prudently avoided stating, on 2D. 5 U. C. Q. B.

the face of the award, the grounds of his decision. Had he done so, and these appeared *wrong*, the interference of the court in that case, in order to rectify that wrong, would be inevitable, if it were to such an extent as to do serious injustice to either party.—Sharman v. Bell et al. 5 M. & S. 507.

It has always been the inclination of courts to support awards, and to assume that judges chosen by the parties have acted correctly and arrived at a proper and equitable decision between them; but the power of the courts to interfere is undoubted, in cases of improper conduct, where such misconduct is shewn on affidavit, or where it is shewn that an award is so notoriously against justice that such misconduct may be inferred.—Watson, 151.

In the case of Chace v. . Westmore, 13 E. 357, Lord Ellenborough says, "I fear it is impossible to lay down any general or certain rule upon "this subject, in what cases the court will not suffer an award to be "opened; it must be subject to some degree of uncertainty, depending "upon the circumstances of each case. In the present case, where the "merits in law and fact were, referred to a person competent to decide on "both (a barrister), we will not open the award, unless it could be shewn "to be so notoriously against justice and his duty as an arbitrator, that "we could infer misconduct on his part."-5 M. & S. 504. And in Watson on Awards, page 155, it is stated, "instances will be found in the books. "in which cases the submissions were made rules of court, under the "statute (9 & 10 Will. III. ch. 15,) of motions to set aside awards other "than for the misbehaviour of the arbitrators; but it was never questioned " in any of those cases, but that the courts have jurisdiction, under the " statute, to set aside awards for any objection whatsoever, if the applica-" tion were made in due time."

In the case of Rogers v. Dallimore, 6 Taunt. 611, an arbitrator discovered that he had made a mistake in his award and notified it to the parties, the Court of Common pleas directed a rule to be drawn up to set aside the award, or that the matter should be referred back to the arbitrator. And in Richardson v. Nourse, 3 B. & Al. 237, Chief Justice Abbot says, "I do not go the length of saying, that where arbitrators "proceed upon a mistake upon a clear principle of law, the court will not "set aside their award."

Where, then, any mistake is made in an award by arbitrators which is acknowledged by them, or any mistake upon a clear principle of law by which an arbitrator professes to be guided, the court will interfere to rectify them. If this be so, then I cannot discover any sufficient reasons why, when such mistakes, accidental or intentional, are clearly established by uncontradicted affidavits, the court should hesitate to afford relief. It may be admitted that the umpire in this case conceives he has only done justice between the parties, but if the affidavits shew that his award is so notoriously against justice that misconduct may be inferred, it appears to me that the defendant is entitled to relief.

If this application is refused, I cannot imagine that any case can ever be established in which it would be proper to interfere, even if the most gross and palpable errors were shown on affidavits.

The right of the plaintiff to recover in this case, must depend upon the fact whether the defendant, or his firm, have received any monies to his use. If, in ascertaining that fact, the umpire took upon himself to strike off items from the defendant's accounts which he was not warranted in doing, so as to leave a sum applicable under the terms of the guaranty to the reduction of the plaintiff's claim against Messrs. Hackett & Co. surely that is an injustice from which the defendant is entitled to be relieved, more especially if the amount be large. The defendant's undertaking, on which plaintiff's claim must entirely rest, is dated the 20th January, 1841. At that time, a balance was confessedly due to the defendant's firm, from Messrs. Hackett & Co., of £3566 14s. 1d., and they held two notes besides, dated 25th September preceding, payable in twelve months from date, together with £2500, for which, on the supposition that they would be paid at maturity by the indorsers, credit was given in the account with Messrs. Hackett. It was proved that they were not so paid, but that suits had been instituted against the indorsers. When default was made in the payment, the defendants, as it appears to me, had a right again to add these notes to the debit side of their account; and at the arbitration it was also proved that, at the time the guaranty or undertaking to the defendant was given, there was a further sum of £259 not charged in the account, which was due from Messrs. Hackett & Co., to defendants. These sums, amounting to £6325 14s. 1d., the defendants were entitled to have paid from the proceeds of property received by them from Hackett & Co., before they could be called upon to pay any sum on their undertaking, as a surplus remaining in their hands payable to plaln_ tiff. If, as is sworn to in the affidavits produced by defendant in support of this motion, only £4401 17s. 6d., has been actually received by the defendants from the property received by them, then a large balance would still remain due to them of £1923 16s. 7d.; and by this award the defendants may not only be deprived of their own claim, but compelled to pay to plaintiff a sum of £1179 4s. Id. If the notes indorsed by Messrs. Ferrie and Bradbury should never be recovered (and until they are, they are not equivalent to money had and received), the defendants will lose their whole balance of £1923 16s. 7d.; and if this award stands and they are made to pay the amount, they will lose that sum in addition to their own. But should the notes be recovered, they would then have a balance, payable to the defendant, of £603 os. 8d., only instead of the amount of the award, £1179 4s. 1.; so that, with all they have received and all they can receive, if they should be compelled to pay this award—as they must, should this application be rejected they must lose a sum of £576 3s. 5d., being the difference between the amount of the award and the sum which will be in their hands if they recover the notes.

But assuming that the notes (£2500) were received by the defendants as payment and should not be added to the account of Messrs. Hackett & Co., then a balance of only £576 3s. 5d. would remain in defendant's hands to the use of the plaintiff; and if that amount were awarded to the plaintiff, and the interest on it, instead of his whole claim against Messrs. Hackett & Co., of £874 9s. 2d., and the interest, there would still be a difference of about £300 in favour of the defendants; so that to that amount, at all events, injustice must be done to the defendants by upholding this award, independent of the consideration that they will be

compelled to pay, as money had and received, a large sum which in fact they have not received. By the affidavits, it appears that the umpire refused to give to the defendants counsel a copy of the notes of evidence, though he had previously given them to Mr. Burrowes, plaintiff's counsel; and, on the face of the award, it appears that he assumed the power of ordering judgment to be entered at an earlier period than the law would admit, and also ordered the defendant to pay a sum of £76 10s. (of which £26 10s: to himself) for costs of arbitration, though as to the entry of judgment and the payment of these costs the submission gave him no authority. These circumstances, taken in connection with the fact that the statements contained in the defendants affidavits remain wholly uncontradicted, that no explanation whatever is given as to the grounds of making such an award, though impeached by the affidavits, do in my opinion shew such a case of mistake and error, either accidental or designed, as calls upon this court for its interference.

Judging from the affidavits, the award appears to me to be, in the words of Lord Ellenborough, "so notoriously against justice, that we can infer "misconduct on the part of the umpire," and I therefore think the award should be set aside.

I am aware that even where mistakes have been acknowledged, in a recent case in England (Phillips v. Evans, 12 M. & W. 309), the court would not interfere, on the ground that they would not enter into the merits; but as the power of setting aside awards was given to the courts and exercised by them for the purpose of preventing injustice, and as a refusal to interfere in such cases, where manifest injustice would otherwise be done, might have a most injurious effect in inducing arbitrators to consider their decisions not subject to the control of the courts, whatever injustice may be inflicted by them, unless on grounds appearing on the face of their awards, I am wholly unable to persuade myself that such a decision can be sustained on any grounds consistently with justice or equity.

McLean, J., dissentiente.

Per Cur,-Rule discharged,

MASSON V. HILL ET AL. EXECUTORS OF HILL.

Where a plaintiff sues two or more defendants as executors—the entering a nolle prosequi, and discontinuing as to one—is not a discontinuance of the action

The new rule of court, making the plea of non-assumpsit to a bill or note bad—is confined to cases where the action is between the parties to the bill or note—it does not extend to executors, &c.

The plaintiff sues the defendants as executors of a testator, the endorser of a note, which had not become due till after the decease of the testator; he avers due notice to the executors of the dishonour of the note, and then states that by reason thereof they became liable to pay the amount of the note, and that being so liable they afterwards as executors promised to pay on request. The defendants plead, as to so much of the declaration as alleges that they promised to pay the plaintiffs, &c., that they did not promise, &c. Held per Cur., on demurrer to plea—plea bad, as raising an immaterial issue; the promise of the executors to pay being implied from facts averred in the declaration, and not denied in the plea.

This action was brought to recover from defendants as executors, the amount of a promissory note indorsed by John Hill, the testator, which

note became due after the death of the testator. It alleged presentment to the maker and non-payment, due notice of non-payment by the maker, given to defendants, as executors, after the death of the indorser, by reason whereof the defendants, as executors, became liable to pay the sum of money in the note mentioned; and being liable that defendants, as executors, promised to pay plaintiff the same on request, yet that they have not done so.

The defendants, not denying the making of the note, or the endorsement by the testator, or the death of testator, or any of the facts alleged to shew their liability on the note, limited their plea to so much of the declaration as alleged that defendants, as executors promised to pay the said note, and then said that they did not promise in manner and form as the plaintiff had complained against them; putting in issue nothing but the promise, and not alleging that they did not as executors promise.

The plaintiff demurred to the plea, on the ground that the promise stated in the declaration was an implied promise, arising from the facts therein set forth; that the plea raised an immaterial issue, and if joined in would put plaintiff to the proof of an express promise. It is also objected, that the new rules of court prevented the defendants from pleading non-assumperunt to an action on a promissory note, as in this case.

P. M. Vankoughnet for the demurrer. The plea is bad, as tendering an immaterial issue. Had the defendant pleaded generally to the count, the plea might then have been good, as it would have denied certain facts averred in the count, viz., the endorsing, presentment and dishonour of the bill; but confining his plea, as he has done, to the promise contained in the count, the defendant is attempting to put in issue a promise necessarily implied in law from previously alleged facts, which his mode of pleading has admitted to be true, and which he therefore cannot traverse.

An express promise is not essential to charge the executors; an implied promise is sufficient; and the defendants being estopped by their pleading from denying such a promise, the plaintiff is entitled to recover.

The plea is also bad, as violating one of the new rules of pleading—that non-assumpsit cannot be pleaded to a bill or note.

Wallbridge, of Belleville, contra. The plea, it is true, does not deny the indorsing, &c., of the note; but neither does it deny the general promise implied by law upon the facts mentioned in the declaration. The promise which the law implies is the promise made by the testator, upon his indorsment. This is not traversed. The promise that is traversed is the express promise subsequently made by the executors, upon which they are sought to be charged, and which could only be met by the direct traverse of the plea.—2 M. & W. 720; 2 D. & L. 892.

With respect to the new rules, it is clear they do not apply to this case. The plea of non-assumpsit is only bad when the parties to the action are upon the note. It is a good plea as here, where the parties sued do not appear on the face of the note.—2 D. & L. 892; 5 Dow 728.

But supposing the plea to be bad, the plaintiff cannot recover in this action. The suit is commenced against two defendants as executors; one of the defendants plead ne unques executor, and the plaintifi enters a nolle prosequi and discontinues as to him, and then proceeds as to the other. This he cannot do, a discontinuance as to one being a discontinuance as

tinuance as to the other, and a discharge of the action—I M. & W. 146; I Saund. 207 (n.)

Vankoughnet in reply. There could be no implied promise on the part of the testator, to pay on request. The note had not become due at the time of his death; and his promise, as endorser, could only have been conditional upon the due presentment, &c., of the note at maturity. The promise implied by law was necessarily on the part of the executors. That was and could be the only promise mentioned in the declaration, and of course the only promise to which the traverse in the plea could have referred.

The entering a nolle prosequi as to one of the executors, is no discharge as to the other. The defendants are not jointly liable as individuals in their personal capacity, but only legally liable as executors. If therefore one of the defendants sued was not an executor, and so pleaded, a discontinuance as to him could not be a discontinuance as to the other. It is evident, the principle upon which a release to one of two joint contractors operates as a release to the other, does not apply.—

1 Saund. 207 (n); 2 M. & S. 444; 1 M. & M. 146; 1 Wils. 89.

ROBINSON, C. J.—There seems to be no ground for holding, that the plaintiff has discontinued his action wholly by entering a nolle prosequi as regards one of the defendants, who had pleaded that he is not an executor, because that is a ground which does not go to the action, but is matter of personal discharge of one of the parties sued; it does not come within the reason on which Jaffray v. Frebain and others, was ruled at Nisi Prius.—5 Esp. C. 47.

Upon the other point, the case in 2 Dowling & Lowndes, 892, is express authority; and Gilbert v. Platt, 5 Dowling, 748, is to the same effect in principle, though the parties are reversed. The courts there clearly treat the rule, that there shall be no plea of non-assumpsit to an action on a note or bill, as confined to cases where the action is against the party to the note or bill-or, as they express it, when the action is simpliciter on the note; where the contract is an express contract by bill or note, not an implied contract through it. In a note to 2 Saunders, 64, note (t), this is treated as the effect of the rule; and I do not see that we can hold otherwise, without putting ourselves on a different footing from the courts in England, as regards the effect in this respect of the new rules of pleading; and this would, I think, be inexpedient and inconvenient, both as regards the court and the profession; and I do not see that we can be embarrassed by adhering in this case to the principle which has been laid down in England, in the cases cited, so broadly as to admit of no exception.

The plaintiff here charges the defendants as being liable as executors on a note indorsed by their testator, which fell due and was dishonoured after his decease, of which he avers they had notice.

He then charges, that by reason thereof they became liable to pay the amount of the note, and that being so liable, they afterwards as executors promised to pay on request.

The defendants plead, in their second plea, as to so much of the declaration as alleges that they promised to pay the plaintiff the amount of the note, that they did not promise in manner and form as he has alleged, and they conclude to the country.

The declaration contains but one count: if therefore we are to take this plea as leaving any thing unanswered, it must be something alleged in this count.

Now take it to be true-as it certainly has been decided in England in the cases referred to, and as the law is stated in a note by the learned editors of the last edition of Saunder's Reports, 2 Saund. 64, note (t)that the rule declaring non-assumpsit to be inadmissible in an action on a note, applies only where the action is simply upon the note against the maker or indorser, we are to look at this plea as if it were pleaded before any such rule was made; and how should we in that case have treated it? I should certainly have thought, that it tendered an immaterial issue, so far as the trial by jury was concerned, being a denial of a promise which arises in law upon the facts stated and not denied. The case of Timmis and another, Executors of Platt, 2 M. & W. 720, is embarrassing; and I am not sure that I fully comprehend its effect, for it seems to deny that there is any such principle as that an assumpsit is implied from a legal liability, even in respect to the original debtor; and if a promise is not implied from the liability of the maker of a note to the executor of the payee, I do not see why it is more to be implied from the liability of the executor of the maker or indorser to the payee. If no assumpsit is implied in such a case, then the action of assumpsit could not be supported, when no assumpsit is averred by the testator, unless upon the footing of the promise averred by the executor, which we must therefore take to be express; and looking at it in that point of view, it would be impossible to say that this plea is bad for the reason assigned, that it traverses the mere legal liability.

But, as the court observed in Seward v. Baker, IT, R. 616, and Webb v. Thomas, I Taunton, 540, we can never see on the record in assumpsit whether there has been an express or implied promise—it must be left to be matter of evidence.

In Timmis v Platt, 2 M. & W. 720, the declaration was upon a note which would have been clearly barred by the Statute of Limitations, if there were no subsequent promise; and that is given as a reason why the promise laid to have been made to the executor must be taken to be an express promise. But the statute could be no bar until it was pleaded; and in answer to such plea, the plaintiff could have replied the subsequent express promise, if he meant to rely upon one, and that would, no doubt make proof of any express promise necessary.

Taking that case as it is reported, it seems unequivocally to affirm however, that no action can in any case be supported in assumpsit by an executor upon an implied promise to him, arising out of the debt due to his testator.

Here the parties are reversed. It is the executors who are charged upon a cause of action which was not complete in the time of their testator; for as maker of the note, he was not in default up to the time of his death, the day of payment not having arrived. If the defendants had pleaded non-assumpserunt to the whole count, then I think that would have been a good plea, not prohibited by the new rules. It would have put the plaintiff to proof of the indorsement, presentment and notice, and could not therefore have been an immaterial plea; but being expressly pleaded, as it is, only in denial of the promise by the

executors, it admits the endorsement, presentment and notice, from whence as the liability to pay only first attached in the time of the executors, the promise in law must inevitably arise, or there could be no assumpsit in such a case, unless where the executors promised expressly.

A promise in law, I think, does arise in such a case; and the effect of this plea is to traverse such promise, which the executor cannot do.—12 M. & W. 226.

MACAULAY, J.—It seems to me competent to the plaintiff to enter a nolle prosequi as to Givens. The defendants are sued in autre droit; and the declaration only charges them in their representative capacity, in respect of the assets of the testator. It is not a joint action against them personally, requiring express promises and joint liabilities to be established; but it is founded solely on their legal liability as executors,—Moravia v. Hunter, 2 M. & S. 444; I M. & M. 146; I Saund. 207 (a). And it appears to me such nolle prosequi may be entered, not only as respects the plea of ne unques executor, but also to the other pleas pleaded by him; and that such nolle prosequi is not a discontinuance of the suit, or a discharge of the other defendants.

With respect to the plea of non-assumpsit, it is only pleaded to so much of the declaration as alleges, that the defendants promised the plaintiff to pay on request the amount of the note declared on; to which the defendant Hill says, that he did not promise in modo et forma-for a nolle prosequi being entered as to Givens, I look upon it now as a sole plea by Hill. The promise is not laid in the declaration as contemporaneous with or as resulting from the legal liability of the executors to pay, for the note is stated to have been made on the 21st May, 1846, for £133 19s. 9d. with interest, payable one year after date, and the promise is laid on the 1st June, 1847. Taking the date of the note to be the 21st May, 1846, it would become due on the 24th of May, 1847, whereas the doclaration, after alleging the liability of the executors to pay, states, that they being so liable, afterwards, to wit, on the 1st of June, 1847, as executors, promised to pay on request. But I consider this promise in effect the same as if laid at the same time, or upon the same day that the liability to pay accrued; as I think is clearly shewn by the case of Donaldson v. Thompson, 6 M. & W. 317. And the validity of the demurrer depends upon the question, whether it may be regarded as only an implied promise in law from the facts previously alleged, or must be regarded as an express promise made by the defendant as executor.

If it is necessarily to be regarded as an express promise, then the cases are clear, that the plea is good within the new rule, which says, that the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law, with this exception, however, that in actions upon bills of exchange or promissory notes, the plea of non-assumpsit shall be inadmissable; and a leap in denial must traverse some matter of fact, as the drawing, making, indorsing, accepting, presentinp of notice or dishonour. That an express promise, alleged to have been made to or by executors, may be traversed as a matter of fact, notwithstanding the above rule, is shewn by the case of Timmis v. Platt, 2 M. & W. 720; 5 Dow. P. C. 748, S. C.; and 2 D. & L. 892.

If an implied promise to pay as executor can arise in any case out of

a contract or transaction of the testator in his lifetime, I apprehend the present must be so regarded. That such a promise may be implied, under certain circumstances, is, I think, shewn by the case of Powell v Graham, Ex. 7 Taunt. 581; 1 Moor, 255 S. C.; Eiddell v. Dowse, 3 Bing. 20, and 6 B. & C. 255, in Error; Williams' Executors, 1087-8, 1154; 5 B. & A. 204. See also Corner v. Shew, 3 M. & W. 350 where in reference to an action on a contract with the testator for work contracted to be done for him, but performed after his death, Parke, B., says, "the declaration should state the contract to have been made with "the testator; that at the time of his death the work was incomplete, "but was finished afterwards, and that the defendant as executor then "promised to pay."

And where the law implies a promise from the facts stated, though in a case like the present, it may be necessary to aver a promise to pay on request, notwithstanding the omission of such an averment in the new rules, still it is only required *pro forma*, and the omission is only ground of special demurrer.

In Powell v. Graham, supra, no promise was laid in the 8th count, and upon general demurrer the objection was disregarded; the only point which the court thought material, being whether it was necessary to allege that the defendant had assets in hand.—Henry v. Burbidge, 3 Bing. N. S. 501; Griffith v. Roxborough, 2 M. & W. 734, 6 Dow. 75; Stericker v. Barker, 9 M. & W. 321; and Smith v. Cox, 11 M. & W. 475, are also express on this point.

It appears to me, therefore, that the law does raise an implied promise by the defendants as executors to pay the note on request upon the facts stated in the declaration, and this without an allegation of assets, as is established by the case already cited of Powell v. Graham.

It is presumed, that where the estate of a testator is liable, the executor has assets till the contrary is shewn. This must be looked upon, therefore, (whether regarded as an implied or express promise) as nothing more than what the law implied upon the facts previously stated. Whether the plaintiff means to aver an express or only an implied promise may be questionable, but to warrant the plea of non-assumpsit the court must see that it is an express promise, and not only so, but that it is a promise which the law would not have implied. This, I think, is the distinction taken in Timmis v. Platt, 2 M. & W. 720. There the plaintiff's executors charged the defendant with a promise to them as executors to pay a debt accrued in the lifetime of the testator; and it being asked (arguendo), that had there been an express promise to pay made to the holder (or testator) after the Statute of Limitations began to run, could the defendant plead non-assumpsit? Parke, B., remarked, that "there nothing "would appear on the face of the record to shew that the plaintiff was "bound to prove anything more than the promise contained in the note "itself." Here there is. Alderson, B., said, "the real substance of the " plea was not to traverse the promise implied by law from the making of "the note, but to deny matter of fact, from which the contract alleged "might be implied, or rather (for I think it is misreported) to deny "matter of fact, being the express promise alleged." In that case, as also in 2 D. & L., 892, there was a complete cause of action in the life-

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time of the testator, with an implied promise to pay on request, under which circumstances, as said by Parke, B., 2 M. & W. 721, "it was im"possible to say that any promise was implied by law to pay the executors;
"that the right of action was transferred to them, but no promise was
"implied by law to pay them; there must be an express promise to the
"executors to support the action as laid; the cause of action was the ex"istence of the note with the express promise to the executor to pay the
"amount of it."

Herein lies the difference between the above cases and the present. Here the cause of action was not complete in the lifetime of the testator, and the only implied promise on his part, existing at his death, was conditional, to pay in the event of the note being duly presented, dishonoured and due notice thereof given.—Watkins v. Wake, 7 M. & W. 488-9. No promise had yet resulted to pay on request. The cause of action accrued after his death, when such promise was for the first time implied by his executors.

Here it may be strictly said that the action is on the note only, or simpliciter, and on the promise to pay contained in or implied by law from it.
—See 2 M. & W. 721-2.

Had no such promise been laid, its omission could not be objected to unless on special demurrer, because the facts stated shew a good cause of action against the executors as such, and a promise would be implied therefrom in law.

An express promise, such as that laid, however it might take a case out of the Statute of Limitations, would not enhance the responsibility of the executors, or render them liable personally or otherwise than as executors, in respect of the assets received from the testator's estate. If it would, then it would come within the principle of the case reported in 2 M. & W. 720, and 2 D. & L. 892; 3 Bing. 20; and Dowse v. Cox, 10 Moo. 272. Powell v. Graham, already cited, and Williams on Executors, 1087, shew this.

I at one time thought the plea admissible, with a view to the Statute of Limitations, on the ground that, if the defendants pleaded actio non accrevit infra sex annos, the plaintiff might take issue and prove an express promise to pay by the executors as such, within six years.—1 H. B. 105; 1 Saund. 210, 211 (n.); 5 T. R. 8; 7 T. R. 350 (n.); McCulloch v. Dawes, 9 D. & R. 40; 3 N. & M. 512; 2 B. & C. 30; Atkins v. Tredgold, 3 D. & R. 207-8; Tulloch v. Dunn, R. & M., N. P. C., 416. But upon consideration I have relinquished the idea, notwithstanding what is remarked by Parke, B., in 2 M. & W. 720, where, speaking of the defendant's promise to pay the plaintiffs as executors, he said, "what "the defendant means to deny is the promise to pay the executors; "the effect of the plea is to admit that the note was signed by him (which "was there the whole cause of action), but to deny that he made any "promise to the executor; how otherwise is he to raise the question on "the Statute of Limitations." For however necessary it may have been for the plaintiffs there to have alleged an express promise to pay them, in order to anticipate and meet a plea of the statute of limitations, it was not necessary for the defendant to deny such promise, in order for him to raise the question of the statute. To do that, he should have pleaded actio non accrevit, &c., on which the plaintiffs might have joined issue, and been thus driven to prove an express promise within six years.

An express promise, in actions against drawers or indorsers, or their executors, may however be material, though six years had not elapsed since the cause of the action accrued; I mean in relation to other matters, such as the want of due notice of dishonor, waived by a subsequent promise to pay, &c. But such is not the distinction on which the plea was there upheld; it was on the ground of its being an express promise that could not have been implied.

But here it may be said in the words of Baron Parke, the effect of the plea is to admit the making of the note, &c., that is the cause of action as laid, including the endorsing, &c., but to deny the promise to pay as executors. The difference is, that there the promise was necessarily an express one, while here it is or may be an implied one; and as respects the Statute of Limitations, the defendants seem to me to be in the same circumstances as the testator would be if alive and sued in their stead. He could not have traversed the promise, because, upon a plea of the Statute of Limitations, the plaintiff would be bound to prove an express one, or facts equivalent thereto. So here it is not a sufficient reason for the defendants' denying the promise per se, that if the original cause of action accrued more than six years before action brought, and they pleaded the Statute of Limitations, the plaintiff would be obliged to prove an express promise within six years. Such a plea, if warranted by the facts of the case, would no doubt have the effect of indirectly putting in issue the fact of an express promise. But such a promise would be other and different from that originally implied by law; and in that event, instead of denying the implied promise, the defendants should have pleaded that the cause of action did not accrue within six years, and that they did not within that period promise as executors to pay. This might have the effect of compelling the plaintiffs to take issue upon either the fact of the time when the action accrued, or upon the denial of an express promise within six years.

What seems to me conclusive is, that, after a verdict for the executors upon this plea, the plaintiff would be entitled to judgment non obstante, At the trial of such an issue, the plaintiff might repel the plea in two ways, viz., by proving an express promise, if he could do so, or by proving the note, indorsement, presentment and notice, as if the general issue had been pleaded to the whole declaration, as was formerly the course; from which facts an implied promise would be inferred. But if failing to establish an express promise, the defendant had a verdict, the plaintiff would nevertheless be entitled to judgment, because the plea is restricted to the promise, and the making, indorsing, presenting, and notice of nonpayment of the note, are now denied; and from those undisputed facts alone, without more, the law implies a promise by the executors, as such, to pay on request. Such facts being apparent on the face of the record, and the averment of a promise to pay being mere matter of form or implied in law, the plaintiff would be entitled to judgment. The plea is a traverse of an inference in law, not of a material fact. The action is founded on the note, no material averment is denied, and the plaintiff is entitled to judgment.

MCLEAN, J.—The note having become due after the death of Hill the inderser, his executors stand, in relation to that note, in the same position as the deceased, and are equally bound to pay in case of failure by the maker, to the extent of the assets in their hands.

They do not traverse any of the facts alleged, or deny their liability, but say they did not undertake and promise in manner alleged. Having admitted their liability as executors, the law raises an implied promise to pay, which the defendants cannot traverse.

It could not be necessary for the plaintiff, in the present state of the plea, to do anything more than produce the note on the trial, and the implied promise would at once be established, which would entitle him to recover. So long as none of the facts are denied, from which the promise is implied, the defendants cannot deny the promise which is so implied. If they could, then in such a case as this, executors would not be liable to pay a debt due by their testator from the goods of the estate, unless an express promise by them to pay could be proved.

In the case of Timmis et al. Executors of Timmis v. Platt, 2 M. & W. 720, the plea of non-assumpsit was held to be a good plea and not contrary to the rule of court, on the ground that the action was not on the promissory note simpliciter, that is between the parties to the note; and the same point was held in the case of Gilbert, Executor, v. Platt, 5 Dow, 748; and if this were a plea of non-assumpsit to the whole action, we should, on the authority of these cases, probably be obliged to hold it good, though apparently in the face of the rule. As, however, it only puts in issue a promise which the law implies, and therefore raises an immaterial issue, it is, I think, clearly bad.

Jones, J., concurred.

Per Cur.-Judgment for plaintiff on demurrer.

McDonald v. May et al.

The plea of "non damnificatus" to a bond, which is not an indemnity bond, is bad.

Quære.—Can the defendant, after treating the bond as an indemnity bond by his plea, object to the plaintiff's right to recover on the insufficiency of the pleadings on the record?

Where to an action brought by the principal against the sureties of a clerk, for embez-zlement, &c., the sureties pleaded that the principal was dannified of his own wrong, in allowing the clerk to remain in his office after he had become aware of his fraud.

Held. per Cur., that though the fraud of the clerk was known to the principal long before he dismissed him from his employment, still that, as this knowledge could only ap, ly to that portion of the monies taken by the clerk after the principal had been made aware of his conduct, the plaintiff should have had a verdict for something, and that the verdict for the defendants (the sureties) should be set aside.

Debt on bond, in penalty of 500l., made 15th April, 1845.

Defendants crave oyer. Condition set out to be void. 1. If one O'Neill, who had been appointed clerk to the plaintiff, should during his continuance as such clerk, embezzle, misspend, negligently lose, purloin, or unlawfully take away or destroy any money, bills, notes, or other effects, belonging to the said plaintiff, or to the said plaintiffs, or the BANK's customers, which by them shall be committed to the

charge, custody or possession of the said O'Neill, or to which he shall have access. 2. Or in case the plaintiff should sustain any loss or damage by the neglect or misbehaviour of the said O'Neill, then if the defendants should forthwith reimburse plaintiff the amount thereof. 3. And if O'Neill should at all times keep secret the affairs of the plaintiff, and of his or the bank's customers. 4. And should perform all the lawful and reasonable commands of plaintiff. 5. And not absent himself without leave. 6. And should at all times conduct himself with due propriety, diligence, honesty and sobriety, and faithfully discharge his duty as such clerk, then the bond to be void.

Pleas. 1. Non est factum.

2. Non damnificatus.

3. "That to whatever extent the plaintiff has been damnified, by "reason of any matter in the said condition mentioned, he, the plaintiff, "was the occasion thereof, and hath been so damnified of his own wrong, "and by his own voluntary act, and by and through his own means and "default."

Plaintiff replied to second plea, setting out that various persons named had certain sums, which are specified, deposited, between the making of the bond and the 1st May, 1847, with plaintiff, being his customers, for safe keeping, subject to their orders; and that O'Neill, acting as such clerk, had access to such monies, and had the charge and custody thereof, and that he took away such monies and used and misspent the same.

And he assigned, as a further breach, that O'Neill having, as such clerk, &c., the custody of a large sum of money, viz., 500*l*., of plaintiff's, appropriated the same to his own use.

And for a further breach, plaintiff sets out that he was agent for the Bank of Upper Canada, and as such had the care of monies deposited with him, to be held subject to the order of the persons depositing; and that O'Neill had access to such monies, amounting to 500l., and had custody thereof, and that he took and appropriated the monies so deposited to his own use.

And for a further breach, that O'Neill did not keep correct and true accounts of the monies in the last breach referred to, but made and kept false entries and accounts thereof; whereby the business of the plaintiff was greatly decreased, disturbed and injured.

By means of which said several breaches, plaintiff said he was damnified to the amount of the monies demanded.

To the third plea, plaintiff replied, assigning the same breaches as in the last replication, and averred that he, the plaintiff, was not the occasion thereof, and had not been so damnified of his own wrong, or by his own voluntary act, or by or through his own means or default, &c.

Defendants rejoined to first replication, that plaintiff was not damnified in manner and form, &c.; and to the second replication, that plaintiff was not, nor is, except of his own wrong, and by his own voluntary act, and through his own means or default, damnified in manner and form, &c., and concluded to the country.

The plaintiff gave evidence of gross misconduct in O'Neill, by which he had been rendered liable to the Bank of Upper Canada, as their agent, to amount of 9001. and upwards; such as forging cheques in the

names of persons who had deposited money in the bank agency, of which plaintiff had charge, and which O'Neill conducted as his clerk; altering date of checks, and charging the same sum twice, as if upon separate checks; erasing entries; making false castings, so as to make the total amount what it ought to be, though entries were omitted which ought to have been in the ledger, &c. These all occurred in bank matters.

It appeared that plaintiff had discovered various errors of O'Neill's in September and October, 1846, but retained him, nevertheless, till April, 1847, when he discharged him; and that he must, in the interval, have had strong and particular grounds pointed out to him for concluding that O'Neill had committed several forgeries; and yet he retained him, thereby leaving it in his power to commit other frauds.

Defendants at the time objected,

- 1. That the misconduct of O'Neill was not as plaintiff's clerk, but as an officer of the bank.
- 2. That it was not shewn that plaintiff had suffered actually any loss, as he had not yet paid anything to the bank or to his customers.
- 3. That defendants were not liable for any monies paid on forged checks, even if forged by O'Neill, for that would be a criminal offence.
 - 4. That the money was the bank's, not plaintiff's, as alleged.
- 5. No breach proved as to keeping false accounts, &c., of plaintiff's, the accounts being those of the bank.
- 6. No evidence of misspending; only proof of false entries in the books.
- 7. That plaintiff, by concealing the forgeries and embezzlements as to great part, while O'Neill continued in his service, had thrown suspicion on his whole demand.

The learned judge overruled all the objections, giving defendants leave to move for nonsuit in any of them; and directed the jury to find as to certain facts, but they gave a general verdict for defendants.

Cameron, Sol. Gen., with whom was Wilson of London, moved for a new trial; the verdict being against law and evidence and the judge's charge.

The evidence shews most clearly that great injustice will be done to the plaintiff if this verdict be allowed to stand. The plaintiff may possibly have retained O'Neill in his employment longer than he should have done, after he had discovered or had strongly suspected him of dishonest conduct; but this probable want of promptitude in dealing with O'Neill, ought not surely to deprive him of all remedy against the sureties, for frauds committed by their principal before he had become in any way cognizant of his acts. The judge was fully aware, at the triai, of this insufficiency in the evidence to bar the whole of the plaintiff's claim, and addressed the jury directly upon that point. They have chosen, however, to disregard that part of the judge's charge, and to treat the defence offered as a complete defence to the action; which is so manifestly wrong and so perverse, after their attention had been expressly called to the subject by the judge, that a new trial ought to be granted without costs.

Becher, of London, shewed cause. The jury were well warranted in inferring from the whole of the evidence, that the plaintiff was aware of O'Neill's irregularities from the very first; and it was with this strong

impression on their minds that they found for the defendants. It was incumbent on the plaintiff to have dismissed O'Neill without an hour's delay, after the fact of embezzlement had once been brought home to him; and retaining him as he did, the sureties should be exonerated from all liability on their bond.—1 M. & P. 285; 4 Bing. 464, S. C.

Mr. Becher referred also to several authorities to support the objection taken at Nisi Prius, which the learned judge overruled, and upon which the court did not afterwards pronounce judgment.—Holt's N. P., 84; 2 Ves. jr. 540; 4 Ves. jr. 824; 18 Ves. jr. 20; 2 Swanst. 185; 2 Scott, N. R., 605; 6 Q. B. R., 514.

Robinson, C. J., delivered the judgment of the court.

It is clear to us, on considering the evidence, that if this verdict be allowed to stand, the plaintiff will be deprived of all benefit of his security, contrary to law, and will certainly suffer injustice to a considerable extent.

There is, no doubt, great truth in the complaint of the defendants, that the plaintiff, by his own want of decision in dealing with his clerk, O'Neill, after he had come to the knowledge of circumstances which ought to have awakened his suspicions, left them unnecessarily exposed to further losses, against which it was in his power to have guarded.

I cannot understand how the plaintiff can have felt satisfied in allowing O'Neill to continue to have control over the funds of the bank, after the disclosures that were repeatedly made to him. It was neither just to the sureties, nor to his own employers, nor to himself. At least, such is the impression which the evidence is calculated to make on any juror's mind.

But the jury seems to have lost sight of the consideration, that giving the fullest weight that could reasonably be given to such a defence, it applied only to a part of those defaults of O'Neill, for which the defendants are sought to be made chargeable. They have treated it as if it applied to all, and have relieved the defendants from making compensation for any portion of O'Neill's misconduct.

The learned judge, at the trial, called the attention of the jury to the distinction between those losses and defaults which occurred before the plaintiff had knowledge of O'Niell's unfaithfulness, and those which occurred afterwards; but the jury seems to have looked upon them all in the same light, and have certainly given a verdict directly contrary to law, in acquitting the defendants of all liability, for the plaintiff clearly proved the breaches of the bond, and there is no pretence for saying that any plea was proved which answered those breaches to the full extent.

As to the objection that the record was imperfect, and that plaintiff on that ground could not legally have recovered, the plea of non damnificatus was not suited to the nature of the case, the bond not being an indemnity bond, but it was the defendants who led the pleadings into an irregular train by treating it as such.

We are of opinion that the rule should be made absolute for a new trial without costs, the verdict being contrary to the judge's charge, where the law was plain, and where there was no conflict of evidence that could give rise to any doubt as to the plaintiff's right to a verdict for some amount.

We shall be disposed to allow of any amendment of the pleadings, without costs, if the parties desire it, as it may prevent future difficulty. I will add, for my own part, in reference to the various points raised at the trial, that there is none of them which I am prepared to say ought to have prevailed.

Per Cur.—Rule absolute without costs.

ROBERTSON V. GOIN ET AL.

Debt on recognizance of bail. Plea, no ca. sa. Replication, setting out a ca. sa., directed to the sheriff of the Newcastle District, averring that district to be the district into which the venue was laid, and concluding with a prayer to the court to inspect the record, and giving a day for that purpose. Rejoinder traversing the venue being lad in the Newcastle District, and averring it to have been laid in the Victoria District. Demurer, 1st, because the rejoinder was a departure from the plee; 2nd, that a perfect issue having been joined already by the replication, the defendants were precluded from adding any further pleadings. Held per Cur., rejoinder good.

Declaration, debt on recognizance of bail.

Plea, no ca. sa., duly sued out.

Replication, setting out a ca sa, directed to the sheriff of the Newcastle District, and averring that district to be the district into which the venue in the action against the principal was laid, and concluding with a prayer to the court, to inspect the record, and giving a day for that purpose.

Rejoinder, that the venue was laid in the Victoria District, and not in the Newcastle District.

Demuirer, 1st, that the rejoinder is a departure from the plea, the plea alleging that no ca. sa. was duly sued out, &c., and the rejoinder admitting a ca. sa. was sued out, but alleging a venue laid in the Victoria, and not in the Newcastle District; 2nd, that a perfect issue had already been joined by the replication, which properly concluding with a verification and prayer of inspection, precluded the defendants from adding any further pleading.

J. C. Morrison for the demurrer. The case of Dudlow v. Watchorn, 16 E. R. 39, will no doubt be relied upon by the opposite counsel, as decisive in his favour, upon the first objection taken to the rejoinder, viz., that it is a departure from the plea. It is certainly so much in point, and so strongly with the defendants, that the objection, upon which it will be cited, will not be further pressed.

The rejoinder, however, is clearly bad on the second objection. The nature of the replication precluded the defendants from any further pleading; a perfect issue had been already tendered, and accepted, and joined in by the plea and replication; and it is not open to the defendants to get at a defence under a mode of pleading more extended than the rules of pleading will technically warrant.—2 B & P. 302; 7 Taunt. 30; 1 (h. Pl. 627. The defendants would have had, on the complete issue raised by the replication, all the advantages they sought for by their rejoinder.

R. P. Crooks, centra. The rejoinder is clearly no departure from the plea. The prea avers that no ca. sa. was duly sued out. The replica-

tion, by its averring the issue of a ca. sa., made it necessary for the defendants, in their rejoinder, to state a fact which if true would shew that no ca. sa. had been duly sued out—the averment of this fact does not then cause a departure from the defence set up in the plea; on the contrary, it confirms and fortifies that defence, and is therefore good.

With respect to the objection, that a complete issue had been joined by the replication, and that therefore the defendants were shut out from a rejoinder-if that objection were to prevail, the defendants would be then excluded by a technical rule of pleading from establishing the defence upon which they alone relied. The ca. sa., to be binding upon the bail so as to charge them in this action, must have been issued, not into the Newcastle District, where the recognizance was taken, but into the Victoria District, in which the venue was laid. The fact, therefore, as to whether the venue was laid in the Newcastle or Victoria District, became the very turning point upon which the defendant's liability rested. How was this fact to be ascertained? The inspection of the record, closing the pleadings with the replication, would not prove it, and nothing but an issue joined upon the fact would. How essential then to the defendants was it to put in a further plea upon the record, in the shape of a rejoinder, expressly raising an issue as to the venue. The defendants might perhaps have so framed their plea as to embrace that issue, but they were not bound to do it. It was clearly open to them . in their discretion, to bring out such an issue in their rejoinder. The form in Chitty's Pleading, vol. 3, p. 163, and the note, expressly sanctions this mode of pleading.—See 16 E. R. 38; 7 B. & C. 805; 2 Bing. N. C. 456.

ROBINSON, C. J.—This case is precisely that of Dudlow v. Watchorn, 16 Ea. 42. So far as regards any objection on the ground of the rejoinder being a departure from the plea, on the authority of that case we must hold that it is not, and that ground of demurrer indeed seemed to be abandoned in the argument.

Then what is there in the other objection, that the pleadings had been closed by the replication, and that it was therefore not competent to the defendant to rejoin? In Dudlow v. Watchorn, the replication is not transcribed at length, but, so far as it is given, the plaintiff seems to have vouched the record of the same court in proof of the fact of the issuing and return of the ca. sa., as is done here, and as it was necessary for him to do; but it does not appear that the replication concluded, as this does, by praying the court to inspect the record, and giving a day for that purpose. This seems to be the method of pleading now generally adopted, when the record is in the same court, and it completes the issue as well as if the defendant were to rejoin nul tiel record.

But here, where the record of the writ and return would not show the point on which the defence turns, namely, where the venue in the declaration was laid, it seems necessary that the defendant should be allowed to rejoin.—2 T. R. 576.

Mr. Chitty, in his form, 3 vol. 163, gives a replication, from which this appears to have been copied, with the same conclusion, in all respects. But he states, in a note, that if the statement in it be not true, that the venue was laid in the county alleged, the defendants may traverse the F 5 U. C. Q. B.

allegation or deny the fact. And as the defendants in this case do not traverse the alleged record, but a fact which would not appear on the record, it would be unreasonable that the plaintiff should have it in his power, at his pleasure, to conclude the defendants as to that fact.

But then arises a question, raised by our statutes 4 Wm. IV. ch. 5, and 8 Vic, ch. 36, which relieves the plaintiff from the necessity of laying the venue in the district into which the ca. re. issued.

When the cases relied upon by the defendants here were decided in England, the plaintiff was under the necessity of laying his venue in the county into which the writ had issued, or the bail would be discharged. This is now altered there, by one of the new rules. And while that was the case, if he did not issue his ca. sa. into the same county in which the venue was laid, he must have issued it into a different county from that in which the bail could have surrendered him, because the two were identical.

We have made a similar alteration here; and the question is whether, when the plaintiff has laid his venue in a different county, the issuing the ca. sa. is to be governed by the venue in the action, or by the condition of the recognizance, for it could not in such a case comply with both.

In the Common Pleas in England, under a rule of 22 Geo. II., the plaintiff might lay his venue, as he now may here, in a different county from that into which the process had issued, and the bail would not be discharged. But it was nevertheless required by that court, as well as by the King's Bench, that the ca. sa. should go into the county in which the venue was laid.

It would seem more reasonable, that in this country the ca. sa. should be issued into the county where the surrender is to take place; but by the practice in the Common Pleas, after they adopted the rule 22 Geo. III., and the practice of the different courts in England since, the venue may be laid in a different county.

Macaulay, J.—The pleadings seem in strict conformity with the case of Dudlow v. Watchorn, 16 E. 39, except in the conclusion of the replication; but I cannot satisfy myself (as contended for the plaintiff,) that he can by so concluding it preclude the defendant from traversing a material fact, not involved in the issue as tendered.

On the replication, the only question to be tried by the record would be, whether a ca. sa., such as therein alleged, had or had not been issued—not whether it issued into the district where the venue was laid, nor would it include the point of where the venue was laid.

The defendant's rejoinder admits such a ca. sa., but asserts that the venue was laid in another district, i. e., the Victoria District, and refers to and relies upon the record of the judgment in proof thereof. The cases cited do not appear to me to exclude this rejoinder, and Dudlow v. Watchorn sanctions it, although I cannot say I am fully satisfied with the reasoning on which it is founded. It would have been more consistent with the rules of pleading, had the defendant in his plea stated in the first instance in what county the venue was laid, and then denied the issue of a ca, sa. therein, instead of adopting a form of plea that might have been demurrable as a negative pregnant, and then rejoining in terms perhaps objectionable to the ground of departure. However, it

is treated as a binding authority, and it warrants the course of pleading pursued by the defendant.

Henderson v. Withy, 2 T. R. 576, (see 2 Wil. 113), decided that to a plea of sci. fa. against bail, that the principal died before the return of any ca. sa., followed by a replication stating a particular ca. sa., and that the principal was alive at the return thereof—properly concluded with a verification, on the authority of Filewood v. Popplewell, 2 Wil. 65, and Chandler v. Roberts, Doug. 58.

Tipping v. Johnson, 2 B. & P. 302, in which much reliance was placed. The defendant having pleaded a judgment recovered the plaintiff replied nul tiel record and gave day to produce it; to this the defendant demurred, and the plaintiff did not join in demurrer, but the record not being produced on the day, signed judgment. On rule nisi to set the judgment aside as irregular, it was insisted for plaintiff, that when a plaintiff replies nul tiel record and gives day, it makes a complete issue, and the demurrer was therefore improper, of which opinion was the court, and that the judgment was regular.

Now in that case the defendants must have concluded their plea by verifying the record, and the plaintift merely took issue by denying it; but in the case before us, the plaintiff avers the existence of a record of the ca. sa. stated in his replication, and without affording the defendant any opportunity to answer it, assumes that only one answer could be given, viz., nul tiel record, and therefore it concludes by giving day for producing the record. The cases are not therefore similar.

Jackson v. Wickes, 7 Taunt. 30, 2 Mar. 354. To debt on recognizance of bail defendant pleaded no ca. sa.; plaintiff in reply pleaded a ca. sa. as in the present case, concluding with a verification by the record, and prays that the record might be inspected by the court, but no day given. Defendant demurred specially, because the replication so concluded before any issue was joined. Gibbs, C. J., said "the defendant had the full benefit of every possible rejoinder which he could make, for a day must be given to inspect the record." Park, J., referred to Creamer v. Wickett, Carth. 517, I Lord Ray. 550, as in the pleadings exactly similar, and judgment was given for the plaintiff. Lillie's Entries were also referred to as contain ng similar entries.

In Creamer v. Wickett the defendant pleaded judgment recovered, and the plaintiff replied nul tiel record; it was therefore similar to Tipping v. Johnston, and the pleadings are not exactly similar to Jackson v. Wickes, where the question arose upon an averment of the record for the first time and prayer of inspection, not upon a replication of nul tiel record to a record previously averred by the opposite party.

The case of Jackson v. Wickes is nearest to the one before us, but there the question was raised on demurrer, not upon a special rejoinder denying a material fact stated in the replication; and if the rejoinder in Dudlow v. Watchorn was good, it was not correctly said by Gibb, C. J., that the defendant had the full benefit of every possible rejoinder, which he seemed to make a test as proving the regularity of the plaintiff's conclusion to his replication.

If the defendant could rejoin nothing but a denial of the record alleged, then the case of Jackson v. Wickes is in point to support the plaintiff's present objection, but if not, it fails as an authority. It depends, there-

fore, on the validity of the rejoinder.—See Saunders v. Proctor, 7 B. & C. 800; 2 Sal. 566.

It might as well be said, that to a plea or replication concluding to the country the opposite party could not demur, the similiter being the only alternative, and which the party pleading or replying might add; but I apprehend it is not so.—See Laforest v. Wall, 11 Jurist, 264, M. T. Q. B. 1846.

It may be a question, whether the objection relied on, that a complete issue was previously joined, and so the demurrer was irregular, should not have been raised on motion to set it aside; and whether it does properly form a ground of exception on demurrer, denying not its irregularity but its sufficiency in law.—I Saund. 96 a; Styles, 402; I. Sal. 219; Stephen's Pleadings, 272-3; Cameron's Rules, 27-8, No. 19; 5 Bing, N. S. 629.

As to the rejoinder, it is also objected to as being a departure from the plea, but Dudlow v. Watchorn is expressly against this objection, although were it not for this decision, I should think there was much weight in it.

Lastly, that the rejoinder traverses an immaterial point; at first I was disposed to think the rejoinder bad on this ground, the ca. sa. having issued to the sheriff of the district, to whom the defendants undertook to render their principal, and such seeming the most regular mode of calling upon them to do so; although they might, upon such notice, having exonerated themselves by a render to the sheriff of the Victoria or of any other district, under the statute 4 Will. IV., ch. 5. On consideration, however, I think the rejoinder good. Formerly the venue in bailable actions was determined by the district into which the original or first process issued, but the New Rules (Cameron's Rules, 19) having provided, that a declaration laying the venue in a different district from that mentioned in the process should not be deemed a waiver of the bail, it follows, that in this case, although the first process may have been to the Newcastle District, and the arrest and bail in that district, which the pleadings import, still the venue being afterwards laid in the Victoria District was regular, and no waiver of such bail.

The statute 2 Geo. IV., ch. 1, sec. 11, requires the condition of the recognizance to be, to render to the sheriff of the district in which the action is brought. Now before declaration. the action must be taken to be brought in the district into which the first or original writ issued, (see Daly v. Hammill in this court,) and the condition of the recognizance must be framed accordingly. Yet, notwithstanding this condition and the 12th section of the same act—the statute 4 Will. IV., ch. 5, sec. 1, em powers the bail to render their principal to the sheriff of any district in which he might be resident or found; but at the same time, the practice touching the way in which the bail can be regularly called upon to render, remains the same. Now that practice is, that to fix the bail, ca. sa. against the principal should be issued to the sheriff of the district in which the action is laid, and be returned non est inventus.

The county into which such ca. sa. must issue, according to the English practice, does not depend upon the place where the bail have undertaken to render their principal; for the court of Queen's Bench, having a prison of its own—the condition of the recognizance will be

found to be to render him to the keeper of such prison, and so of the Common Pleas. Notwithstanding this, the ca. sa. did not go into the county in which the prison was situated, but into that in which the venue was laid, which formerly, in the Queen's Bench, was necessarily that in which the action was laid, i. e. into which the original process issued, though otherwise, under special rule of court, in the Common Pleas.

Now the like rule prevails in all the courts; and still the condition of the recognizance, and the county into which the ca. sa. issues, would seem to be the same as formerly, i. e. to render to the Queen's Bench prison, &c., and the ca. sa. to the county in which the venue is laid in the declaration. In England, the render is not made, as here, to the sheriff of the county or of any county, but the party is brought before a judge and committed by him to the prison of the court. Another consideration is, that the execution, whether fi. fa. or ca. sa., must follow the judgment; so that an original ca. sa, could only regularly issue into the Victoria district, if the venue is laid therein, and not to the Newcastle sheriff.—Tidd. 1067, 1036.

This seems to shew that the ca. sa. should have been issued to the sheriff of the Victoria district, as the only regular mode of calling on the bail to render their principal; and although they engaged to render him to the sheriff of Newcastle, it was incumbent upon them to watch the proceedings and to take notice where the venue was laid, if not in the Newcastle district, and, when regularly called upon in that district, a render duly made in the Newcastle or any other district would be sufficient.—Hartley v. Hodson, 2 Moor, 66; 8 Taunt. 171, S. C.; stat. 7 Wm. IV., c. 3, s. 33, the proviso; stat. 1 & 2 Vic., c. 110: 8 Vic. c. 36.

JONES, J.—The case of Dudlow v. Watchorn et al. 16 E. 38, cited on the argument, shews that the replication of the plaintiff is not a departure from his declaration; and if so, it appears to follow that the defendant had a right to rejoin and deny the allegation that the venue was laid in the Newcastle district.

The better course would have been for the defendant, in his plea, to have alleged that no ca. sa. had been sued out in the Victoria district, instead of pleading generally that no ca. sa. had been sued out.

By the case in 2 T. R. 576, the statement that the venue was not in Newcastle is new matter, which was open to the defendant to deny, as he has done.

Upon the pleadings, the defendant is entitled to judgment, and as I think the ca. sa. should follow the judgment, the plaintiff could not recover if the venue in the original action was in Victoria, and no ca. sa. was issued to the sheriff of that district.

The most convenient district for the bail to watch the proceedings against the principal is that in which the venue was laid, and not that in which the recognizance was taken. The venue may be laid in any district; and if it should be determined that a ca. sa. to charge the bail must be issued to the sherift where the recognizance was taken, in all cases when the venue is in a different district a testatum would require to be issued.

The ca. sa. against the principal in the Common Pleas, to charge the

bail, may be issued to the sheriff of the county where the bail was entered, or to the sheriff of the county where the venue is laid.

The recognizance by the provincial act 2 Geo. IV., s. 9, is that if the defendant shall be condemned in the action, he shall satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the district in which the action shall be brought.

No action can be brought against the bail upon the recognizance, without first issuing a ca. sa. against the principal, as notice to the bail to surrender the principal.

Bail, by 4 Wm. IV., c. 5, may surrender the principal to the sheriff of any district in which he may be found.

All recognizances being required to be returned to the office of the clerk of the crown, in any action upon a recognizance, the venue must be laid in the Home district; and the venue in the original action being laid in any district, the ca. sa. to charge the bail, it appears to me, should be in the Home district. For although the recognizance of bail may be taken in any other district, the place where the bail must watch or search proceedings, to ascertain whether the ca. sa. has been issued, would naturally be where the proceedings have been carried on.

It cannot be required that the plaintiff should issue his ca. sa. in any other district, although the arrest may have been in another district and the recognizance of the bail be that the surrender shall be to the sheriff of such district.

McLean, J.—The case of Dudlow v. Watchorn, 16 E. 39, and the case of Darling v. Gurney et al., 4 Tyr. 101, seem to be in all respects like this. The bail in these cases pleaded, that no ca. sa. was duly issued and returned and filed, according to the practice of the court. The plaintiff replied, stating the issuing of the ca. sa. in the former case into Middlesex, in the latter case into London, each alleging that the county, into which the ca. sa. was issued, was that in which the venue was laid, The defendant in each of these cases rejoined, that the venue was in a different county from that stated by plaintiff. In the first case plaintiff demurred, on the ground that the rejoinder was a departure from the plea; but the court held, that the word duly referred to the county or place into which the ca. sa. issued, as well as to the practice in issuing, returning and filing the writ. In the other case, Darling v. Gurney et al., no objection was taken, that the rejoinder was a departure. But the plaintiff's surrejoinder, putting in issue the issuing of the writ into the county stated in the replication, was demurred to, because it did not conclude to the country, but concluded with a verification by record, and the latter conclusion was held right.

Assuming that the ca. sa. must be issued into the district in which the venue is laid, though it would appear more reasonable that it should issue in order to charge the bail, into that district to the sherift of which the bail, by their recognizance, undertook that their principal should surrender himself; I cannot see that there is any departure from the plea in the rejoinder filed by defendants in this case.

The plea alleges no ca. sa. duly issued after judgment recovered; plaintiff replies, shewing ca. sa. into the Newcastle District, being, as he alleges, the district in which the venue was laid. The defendants do not deny the issuing of that ca. sa., as alleged by plaintiff; but if the

venue was in the Victoria District, as stated in the rejoinder, and that it was necessary, in order to charge the bail, to issue *ca sa*. into that district, then the *ca. sa*. issued into the Newcastle District could not have been *duly* issued, and the rejoinder is right, and in accordance with the plea.

If the plaintiff contends still that the ca. sa. was properly issued into Newcastle, and the fact is as he states, that the venue was in that district, he make take issue on the rejoinder, as was done in the case 4 Tyr. 101; or if the venue was in the Victoria District, and the plaintiff nevertheless contends, that the issuing of the ca. sa. into the Newcastle District was right, the recognizance being to pay the debt if the parties arrested did not surrender themselves to the sheriff of that district, then he should have taken a different ground of demurrer, and the point would be decided on that ground. As it is, there is no departure from the plea in the rejoinder, and, in my opinion, judgment must therefore be for plaintiff on this demurrer.

Per Cur.-Judgment for the plaintiff on demurrer.

DOE DEM. MILLER V. TIFFANY.

A, purchasing land at sheriff's sale, having reason to believe that he cannot get possession without legal proceedings against the execution debtor B.—to avoid this—contrives by collusion with C. B.'s tenant, to get into possession without the consent of B. Held, per Cur., in an action of ejectment brought by B., against A., that A., thus acquiring possession collusively through B.'s tenant, cannot set up any title in himself adverse to B.; that before he can do this however good his title may be, he must abandon the possession obtained through C., and bring his action against B

A sheriff's deed, being but a completion of the sale, is only good for land actually sold; a party therefore is not estopped by a sheriff's deed from proving by parol, that portions of the land therein described as sold, were not in fact included in the sale; and if the description of the whole land in the deed is so blended together, that one cannot distinguish between what was sold and what was not, the deed will be bad.

Semble, that to support a sale by an ex-sheriff out of office, it must appear, that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of it, and duly followed up

such step after leaving the office.

Semble also, that the mere receipt of writ by the sheriff while in office, will not of itself be an incipient step in the execution of it.

Quære.—What step will be a sufficient commencement of the execution of a writ against lands?

Will an advertisement in the *Gazette* or otherwise, according to the statute, I Geo, IV. c. I, sec. 20, be sufficient?

Ejectment for land in the town of Hamilton, on the north side of King-street, bounded on the south by King-street, on the east by land of Bryan Carpenter, on the west by land of Gwynne, and on the north by lands in possession of the defendant; being about 76 feet on King-street, by 132 feet in depth, being a house and lot rented by the defendant to one John Nield.

The plaintiff's evidence of title was, that he had been many years in occupation of a house on the corner of King-street and McNab-street, in Hamilton; that in November, 1838, he had it leased to one Scott, for a year, and in the following spring, many months before the lease was

out, Scott left the house with the outer door not fastened, and the defendant entered and kept possession.

The evidence was such, as to leave but little room for doubt, that there was an understanding between Scott, the tenant, and the defendant, that the latter, who claimed to have purchased the place at sheriff's sale, should be thus allowed by him to take possession, without the consent or knowledge of Miller, from whom Scott had leased the place.

It was not disputed that Miller had been the owner of the estate, for the defendant claimed to be the owner under a purchase made at sheriff's sale, on an execution against Miller; and the case turned on the validity of the sale and the sheriff's deed.

It was proved, that on the 17th day of May, 1836, a judgment was entered against Miller, at the suit of the Bank of Upper Canada, for £501 13s. 9d., with interest from the 25th of April preceding, and costs of suit.

A fi. fa. against Miller's goods issued on this judgment, on which a small sum was made, and nulla bona returned as to the residue; and a testatum fi. fa. issued against Miller's lands, directed to the sheriff of the District of Gore, returnable on the last day of Hilary term, 1838—Hilary term then being in December. This writ issued on the 25th of January, 1837, and was placed, on the 10th of February, 1837, in the hands of W. M. Jarvis, Esquire, who was then sheriff of the Gore District, but who ceased to hold the office on the 15th of July following.

Mr. Jarvis was a witness on the trial, and swore it was usual with him, while in office, upon receiving an execution against the lands of any person residing in the town, to go immediately, or at least without delay to the defendant, and apply to him for a list of his lands, informing him of the writ; that he went to Miller's house, in Hamilton, for this purpose, after receiving the writ produced, but could not venture to say at what time, and obtained from him a memorandum, which he took down in writing, and which he produced at the trial. This list specified three distinct properties of Miller, the present lessor of the plaintiff, and the defendant in that writ of execution; and at the foot of those three parcels, there was added also, in Mr. Jarvis's hand-writing, but in a paler ink, "Six acres of land, in the town of Hamilton, laid out in town lots, "with buildings." The premises in question formed part of these six acres; and Mr. Jarvis accounted for the entry of these being written in a different ink, and therefore apparently at a different time, by saying, that he supposed he knew the fact of Miller's owning these acres, and that he added them to his list afterwards, at his office. He stated further, that he advertized these six acres for sale, some months after he received the writ, in a newspaper at Hamilton, and could not say that it had ever been published in the Upper Canada Gazette. He admitted that he understood it had not been, though the omission was not designed.

Three newspapers, called the "Hamilton Express," were put in, the first dated the 31st March, 1838, in which Mr. Jarvis, as "late sheriff of the Gore District," advertises, that by virtue of a fi. fa. against Miller, at the suit of the Bank of Upper Canada, he had seized in execution (not saying when, nor whether while he was sheriff or not) six

acres of land in the town of Hamilton, laid out in town lots, all of which would be sold by auction, at the Court-house, on the 30th day of June, 1838. This advertisement was dated, "late sheriff's office, Hamilton, 31st March, 1838,"—the same day that the newspaper issued; and as there was no proof of any earlier advertisement in the Express, nor of any notice in any other paper, the natural presumption would seem to be, that it was the original advertisement first put out by Mr. Jarvis.

It was next shewn, that in a number of the *Express*, dated 7th July, 1838. the advertisement of the sale of these six acres is repeated, with the same date, 31st March, 1838, but with an alteration in the body of the advertisement, adding, after the statement of the bank's execution "and John Young and William Ritchie;" whether meaning that there were several executions at their suits, or one at their joint suit, in the sheriff's hand, is not clear. At the foot of this advertisement is a notice, dated 30th June, 1838, "that the sale was postponed till the 6th of August next," signed also by Mr. Jarvis, as "late sheriff."

Then another number of the *Express*, dated 14th January, 1839, was produced, which contained a copy of the notice, as inserted in that of the 7th July, with three notices at the foot. of several postponements of the sale, to 1st November, 1838, 1st December, 1838, and 15th January, 1839.

No other evidence of advertisements was given. The, land, however, was not sold on the 15th of January, 1839; but the sale was put off from time to time, under instructions given by the plaintiff's attorney to Mr. Jarvis, until 2nd March, 1839, when a sale under the fi. fa. at the suit of the bank, took place.

Mr. Jarvis proved, from a memorandum in his writing, that on that day he put up to sale certain pieces of land of Miller's, in Hamilton, being parts of the six acres, and that the defendant in this suit became the purchaser at that sale of a property, stated in this memorandum to be 'the yellow house, next to Alexander Milnes', for £117. This memorandum, he swore, was made by him at the sale, and it is signed by Mr. Tiffany, opposite that entry, as being the purchaser of that lot.

Then a deed was produced and proved, which was made by Mr. Jarvis on the 6th March, 1839, "as late sheriff," in which it is recited that by virtue of the writ of fieri facias against Miller, at the suit of the Bank of Upper Canada, returnable on the last day of Hilary Term, 1838, to him, then sheriff of the district of Gore, directed, he, the said William M. Jarvis, "as such sheriff as aforesaid and as late sheriff as aforesaid." did seize the lands therein described as the property of Miller, and did publicly advertise the same; and had, on the 2nd day of March, in pursuance of such advertisement, sold the same to George Sylvester Tiffany, Esq., as the highest bidder, for £117; and then Mr. Jarvis, by this deed, as such sheriff, and as such late sheriff, grants, bargains and sells to Mr. Tiffany all Miller's interest and estate in certain lands in Hamilton, which are described in the deed as the lands, tenements and premises lately occupied by the said Andrew Miller, and bounded as follows: commencing at the south-west corner of land lately occupied by Alex-"ander S. Milne, on the north side of King Street, at the point where the "fence, between the said Alexander S. Milne and the said Andrew Miller, "intersects King Street; thence easterly along King Street, 92 links

- " more or less, to the corner of land owned by Bryan Carpenter; thence
- " in a line parallel with McNab Street, two chains more or less, to the
- "north-west corner of said Carpenter's land; thence in a line parallel to
- "King Street easterly, along the northerly boundary of said Carpenter's "land, 75 links more or less, to McNab Street; thence along the westerly
- "boundary of McNab Street, two chains more or less; thence westerly
- "in a direction parallel to King Street, along the southerly line of a
- "market-place, one chain and 67 links more or less; thence in a line
- "southerly and parallel to McNab Street, four chains more or less, to
- "the place of beginning."

The deed was in the handwriting of Mr. Tiffany, who prepared it, and Mr. Jarvis swore that he signed it without reading it, thinking it was all right. The boundaries, as given in the deed, it will be seen, describe an irregular figure; and it was explained by parol evidence, that they embrace what Miller had held as two parcels of land adjoining each other, one of which fronted on McNab Street, the other not.

Mr. Jarvis swore that he only intended to sell the latter piece of land on which the house stood, which was the smaller of the two; and that he did not conceive or understand that the other large piece had been put up and sold to this defendant, Tiffany; that the sale on the 2nd of March not being satisfactory as to the prices bid, he stopped it after selling some of the lots, and verbally adjourned the sale for a week: that in the meantime he discovered that the deed drawn by Tiffany, and which he had signed embraced too much land (both the squares), and remonstrated with Tiffany about it, who contended that both parcels had been put up and bid off by him, and that the deed was in accordance with the sale, but that if there was any dispute about it, he would rather have the larger tract put up again; that in consequence, he Mr. Jarvis, did, on the 9th March at the adjourned sale, put up all Mr. Miller's remaining interest in the larger piece of land, mentioning that Mr. Tiffany claimed it as included in his deed; and he admitted that he might have stated at the same time, that whoever bought it would buy a lawsuit, and that nobody making an offer for the land so put up, Mr. Tiffany bid 30s, and it was knocked down to him.

Mr. Jarvis stated expressly, that though the deed embraced both tracts, it was not so intended; that the smaller one only was sold, and that the £117, mentioned in the sheriff's deed, was the consideration for that alone.

On the other hand, another witness at the trial, who was present at the sale on the 2nd March, swore that he bid for the lot knocked down to Tiffany, under the impression that it embraced both the squares.

This evidence was given in order to establish, that Mr. Jarvis, if he had any legal authority to sell the land at all, which was denied, had proceeded in so irregular a manner as to make his proceedings void; and to lay fair ground for inferring collusion between him and Mr. Tiffany, or an undue influence exercised by the latter over him; and to confirm this impression some evidence was given, that Mr. Jarvis had, on the first day of sale, put up a piece of land to sale as Miller's property of which he knew Miller had before given a deed to the corporation of Hamilton for the site of a market; and though he had never considered or intended that that tract should be included in the notice of sale. It

was explained, however, that this was done at the suggestion of a gentleman on behalf of the corporation, not for any bad purpose, but merely to corroborate the title perhaps to prevent the execution of creditors affectng it prejudically.

Before the sale, Miller left Canada and removed to Rochester, in the state of New York, where he resided till after the sale. It was proved by letters produced at the trial, that early in June, 1838, he had applied to the bank for indulgence, stating "my property is advertised to be sold on 31st June (meaning 30th June), and a very small delay will save "me much pain and perhaps great loss. Sir Allan McNab (the attormey for the bank) promised me he would speak to the directors in my favor." That a few days afterwards he applied again, by petition to the bank, setting forth his means and prospects of paying, and pressing delay, He said, in this petition, "If the bank feels no inclination to "pity or suspend for a short time, I hope they will send up orders to "the sheriff to sell one lot at a time." He strongly solicited a few month's delay.

On the 29th of October, 1838, he wrote from Rochester to Mr. J. Strachan, the partner of Sir Allan McNab, stating that he had written to Sir Allan McNab on the bank matter. "I hope," he said, "you will "give me your aid in the matter, and in case of his absence, postpone it "till he comes." He expressed his hope in this letter that the bank would wait till the spring.

On the 24th of November, 1838, he wrote to Mr. Jarvis, from Rochester, addressing him as his friend, excusing himself to him for having left the province; speaking of the debt he owed the bank; referring to conversations which had passed between Mr. Jarvis and his (Miller's) wife, who it appeared had been going backwards and orwards between Rochester and Hamilton on his business; and expressing his sense of Mr. Jarvis's former kindness to him. "I hope," he said " ou " will let me have a little time now, since I have got my deed on record, " to raise the balance."

On the 14th of March, 1839, he wrote from Rochester, to the cashier of the Bank of Upper Canada, stating that he had been informed by letter 'that the bank had sold some of his real estate in Hamilton, on Saturday, and intended to sell more on the Saturday following," which must have been on the 9th instant. "I hope," he said, "they have not sold much," or again. I intended to be in shortly, and get the balance settled." (It was proved, that before the sale he had paid £90 on account, besides the small sum made on the fi. fa. against his goods. "I could get no "word from Mr. Strachan, my attorney, or from Sir Allan McNab, or any others, when or how it was postponed to. I expected Mr. O'Reilly's 'notes would have paid a considerable part, and that the residue I would borrow here, if the bank would not wait longer, which I supposed they "would let me know."

"It is difficult to raise money here, but not impossible; and if the bank will suspend the residue of the sale for a few days, and let me know by letter, I will write an answer and say when I will forward the money for the balance. I hope they will do this for me. as I have done all I could to raise the money, but could not," &c. * * *

"I was in negotiation," he added, "with Mr. McNab, for a part of the "Hamilton property, and expected he would have written me, if the bank intended to sell. I certainly hope the bank will order proceedings to be stayed, until I can be informed of the balance still unpaid, and how the sales were made, and what I must do exactly. I understood "Mr. Ridout, (the cashier of the bank), if the notes of Mr. O'Reilly were paid, the bank would not sell. I pray them to write and explain, and no time shall be lost to rectify as far as possible the balance."

Miller, it will be observed, spoke of Mr. Strachan, in this letter as his attorney, and it was proved on the trial that Mr. Strachan had been appointed by him to act as his agent, and did act as such, from November, 1838, till after the sale; that in November, 1838, a person came to him from Rochester, bringing a letter from Miller, requesting him to have the sale postponed; and that Mr. Strachan did in consequence procure the sale to be postponed to the second of March, the day when the sale did take place, and wrote to Miller to that effect, and informed his messenger of it.

The evidence was given with the view of shewing Miller's acquiescence and recognition of the sale, and his waiver of any objection that might otherwise have been taken to it as irregular. And it was proved, further, that Sir Allan McNab, having ceased to be solicitor for the bank before the sale, that is between November and March, Mr. Gamble, who succeeded him and who was a witness on the trial, was in communication with Miller respecting the sale, and that the postponements were at his instance. The cashier of the bank gave evidence to the same effect.

Mr. Jarvis, upon being pressed as to the time when he took from the lessor of the plaintiff, Miller, a list of his lands, with a view of advertising them on the writ, declared that he believed the list was made by him soon after getting the writ, but could not be positive as to any time, further than that he was sure it was done before the year expired after which he was to sell, and was very confident it was done in due course and certainly before advertising (which would be before 31st March, 1838); this however, would not be till eight months after Mr. Jarvis had ceased to hold the office of sheriff.

The points submitted to the learned judge at the trial were, that the sale by Mr. Jarvis was void, because he was not then in office, and had done nothing before he left the office which could be called commencing the execution; no seizure shewn at any time, no act whatever proved to be done under the writ while he was sheriff.

2nd. That the sale should be held void on account of the manner in which it had been conducted, a sale only of part being actually made on the 2nd March, and yet a deed made of the whole, as if all had been then sold; then a pretended sale of the remainder on the 9th of March, to bolster up the deed already made, but not sold in such a way as could be expected to procure any actual bid for the land; and this, it was contended, rendered the deed inoperative as to any part of the premises contained in it, especially if the jury should find that the deed had been designedly drawn up improperly by the defendant, in order to embrace land not sold to him.

It seemed that the action was brought only for the smaller piece of land which was undoubtedly intended to be sold, and was sold on the 2nd March.

The learned judge requested the jnry to find whether Mr. Jarvis had commenced executing the writ while he was in office, or not, or at any time before the writ was returnable.

and. Whether there was any fraudulent collusion between the defendant and Mr. Jarvis respecting the larger piece of land included in the deed.

3rd. Whether the defendant acted in good faith or not, when he drew up the deed so as to embrace the whole.

They found that a seizure was made while the writ was current, but whether before or after Mr. Jarvis went out of office they could not say; that the defendant made unintentionally a mistake in the deed (as to the parcels), but they negatived any fraud, or any improper collusion between him and the sheriff.

They found a verdict for the plaintiff, adding that, in their opinion, the defendant had no right to the larger square of land spoken of; in other words, that it was not sold on the 2nd of March, and so could not be legally conveyed in the deed of the 6th.

It was agreed, at the trial, that the verdict should be subject to the opinion of the court, upon the evidence and the facts found by the jury.

Cameron, Sol. Gen., obtained a rule to shew cause why a verdict should not be entered for the defendant on the points reserved.

H. J. Boulton, Q. C., Harrison, Q. C., and Esten, shewed cause.

The title of the lessor of the plaintiff is undisputed, up to the period of the sheriff's sale. Has his title then been affected by the sheriff's sale upon the writ of fi. fa. against the lands? To determine this point we must look at the position of the sheriff at the time of sale. A writ of fi. fa. against Miller's lands, returnable in December, 1838, had been issued on the 25th of June, 1837, and placed in the sheriff's hands on the 10th February, 1837. The sheriff went out of office on the 15th of July, 1837. On the 31st of March, 1838, eight months after he had left his office, an advertisement of sale was for the first time gazetted. It will thus be seen that the ex-sheriff took no step in the execution of the writ placed in his hands. But before a sheriff out of office can sell upon a writ of fi. fa., he must shew that some incipient step was taken by him in the execution of the writ, while in office. Had proceedings been commenced by the ex-sheriff, he might perhaps have completed them by a sale.—2 Mar. 78; 6 Taunt. 370. But in the absence of any such incipient step, the sale by the sheriff, it is submitted, must be held bad; and the title of the defendant resting on the sale, bad also.

Supposing, however, the sale of the ex-sheriff nad been clearly good—it is then contended that the deed of sale to the purchaser was in itself bad. The evidence distinctly proves that one lot of land, conveyed by the deed to the defendant was not in fact sold by the sheriff. Now, what effect has this upon the deed? The deed, it will not be denied is bad pro tanto; but it is also bad in toto, if the description of what has not been sold be so blended with what has been sold, as to make it impossible to discriminate between the two—to detach the one from the other. In the deed before us, no one can pretend to distinguish between

the two lots. The description is clearly inseparable, and the deed must therefore, be pronounced bad.—16 Ves. 516; I Ves. 210; II Coke, 276; 2 Co. 9; 9 M. & W. 376; I4 M. & W. 244.

But assuming the defendant's title to be perfectly good, still it is contended that he is not in a position before the court to prove it.

There can be no question, after the reading the evidence, that the defendant, foreseeing at the time of his purchase that there would be difficulty in obtaining possession from the lessor of the plaintiff, induced his tenant to leave the premises, so that he might enter quietly without bringing an action. Now it is clearly laid down that a third party, obtaining possession in this way surreptitiously, without the consent of the landlord, cannot, till he has restored the possession, set up a title adverse to the tenant's landlord. Upon this ground alone, therefore, without reference to the validity of the sale or deed, the rule to enter a verdict for the defendant ought, it is submitted, to be discharged.

Cameron, with whom was Sullivan, Q.C., and Vankoughnet, of Hamilton, in support of the rule.

There was nothing found by the jury to support the assertion, that the defendant had prevailed in any way upon the tenant to abandon the possession, in order that he might receive it without bringing an action against the landlord. There was no evidence of collusion; nothing to support a surreptitions dealing between the defendant and the tenant for the purpose of depriving the landlord of his possession. But these are facts, which must be found by a jury before a defendant in possession, can be said by the court from the nature of that possession, to hold through a tenant, and so be excluded from setting up the adverse title upon which it is plain he means to rely.

With respect to the deed—it is not intended to argue that the deed being bad in part, may not be bad as to the whole, if the part clearly bad cannot be separated from the part which is good.

But it is contended that the deed as a whole is good. The jury have expressly negatived fraud, which is the only ground upon which parol evidence can be offered to contradict the terms of a deed. The deed itself will operate as an estoppel to any evidence, the purport of which is merely to shew a mistake in its contents. There is therefore, upon the finding of the jury, no legal evidence before the court upon which to question the validity of the deed.

Next as to the seizure. Whatever irregularity there may have been in the advertising or postponement of the sheriff's sale, it is cured by the ratification which the lessor of the plaintiff has at all times given, by his acts and letters, to the sheriff's proceedings under the writ. All that he possibly could do to make the acts of the sheriff legal, he has done. He has, among other things, applied the £117 paid by the defendant on the purchase, to the judgment; at all events he has never repudiated the application and offered to return the money. It is difficult to see why a man may not dispense with a formal seizing, as well as with an actual arrest; and why he may not assent to a sale as he does to go to gool or find bail.

The case, it is contended, presents enough on the evidence to enab the court to say, that from the conduct of the debtor, the late sheriffs right to sell may be now assumed—and that a verdict should be entered for the defendant.—Doe Dissett v. McLeod, 3 U. C. R. 297; 6 Mod. 295; I. B. &. Al.. 230.

Robinson, C. J.—It appears to me, that there is very sufficient reason why we cannot properly authorise a verdict to be entered for the defendant, and that is, that the objection taken at the trial to the manner of this defendant's obtaining possession, and the point raised upon it—that he was thereby disabled from setting up proof of title adverse to that of Miller—does not seem to have been disposed of, as it required to be.

It is true that Mr. Tiftany claims through a title derived under Miller since the latter let Scott into possession as his tenant; and under ordinary circumstances, there would be no impropriety in the tenant giving up possession to him as his landlord, in consequence of the change which had thus taken place in the title; that would be the usual course, and so he might, if he chose, go out before his term was ended, and allow his new landlord to enter.

But the complexion of this case is very different. The defendant here seems to have been well aware, that the validity of the sheriff's sale was disputed by Miller, whether reasonably or not, and that Miller did not intend to give up possession if he could help it. He had reason, I think, from the evidence, to apprehend that legal proceedings would be necessary before he could gain possession. If, in order to avoid this, he contrived by any collusion with Scott to get into possession without Miller's knowledge, then I think the rule is clear, that he can gain nothing by any step of that kind. He must first give up the possession thus acquired from Miller's tenant, before he can be allowed to set up any title in himself, however sufficient his title may be, and however honestly acquired.

A tenant cannot be allowed to put another in possession, or to connive at his slipping into possession, but must deliver up the premises to his own landlord. This principle is laid down in many cases; and it it is very necessary to insist on it, for the protection of landlords.

The evidence, though it does not clearly establish the fact, gives very strong ground for apprehending, that the unusual step of the tenant—abandoning the place some months before his time was out, leaving the door open, and giving no intimation of his intention to Miller—was not without a design to afford this defendant the opportunity of taking his place; and it should at least, I think, have been left to the jury to say whether they were not satisfied that there was such an understanding between them; in which case, the defendant could not be admitted to set up an adverse title to Miller, but a verdict for the plaintiff should have gone of course.

As the fact of concert with the tenant may be said not to be conclusively made out, we could not properly, on that ground alone, allow the verdict for the plaintift to stand, if we are to regard it as rendered only conditionally, and subject to our opinion on the whole evidence, as upon a case reserved; but we could not, in the face of that objection, make the rule that has been moved absolute, and direct a verdict to be entered for the defendant—we must discharge the rule.

If the case had come before us on a concilium, so that we had to consider whether upon the whole evidence the postea should be awarded to

the plaintiff or defendant, then the first point would be on the effect of the sheriff's deed, made—as the jury expressly found, and as I think the evidence proved—by a mistake of the late sheriff, who executed, as he declares, without reading it, the deed prepared by the purchaser, embracing land in fact which had not been sold. This deed was executed on the 6th of March; and of course the putting up on the 9th all Miller's right in the tract not sold, but which Mr. Tiffany maintained he had bought, could have no effect in giving validity to the deed already executed. It was an absurd proceeding, besides, and wholly nugatory as a sale, for it was only an indirect attempt to give effect to a supposed sale, which the sheriff admits was not real. It was no new sale in reality, but a kind of contrivance to divest from the owner two pieces of land for a price that had been bid for one. Mr. Tiffany's bidding for it, under such circumstances, could have no other tendency than to operate in some measure as an admission that he had not bought it before.

It is of no consequence to discuss whether the sheriff may in general ell chattels on a fi. fa. without exposing them at an auction.

Our statutes, 43 Geo. III. ch, 2, and 2 Geo, IV, ch 1, sec. 20, clearly contemplate a public sale in regard to lands; and that has always been the course, both with respect to lands and goods. In this case, the sheriff professes to found his deed upon a sale which he had made, and he did not in truth make such a sale as he recites.

The case of a grantor in a deed not being allowed to set up (in the absence of fraud) that he did not mean to convey what his deed expresses, is not applicable here, because this is the case of a public officer acting in pursuance of an authority given by law, and his acts depend for their validity upon the due execution of his powers. He cannot put up one tract of land for sale, and under pretence of that sale convey another, which was not included in the sale, and for which no price was bid. His recital of facts in his deed is, like his returns, not conclusive upon other parties, though his return is conclusive in the action in which it is made, and is received as *prima facie* evidence in other cases, but liable to be disproved.

It is fortunate that this question is still left to be discussed with the party originally claiming to take under that deed, and that the interests of an innocent purchaser from him have not become involved in it, which might seem to produce hardship.

I should attach no importance to the circumstance of Mr. Jarvis not being in fact sheriff when he executed the deed, as rendering his acts less entitled to favorable presumption than if he had been actually sheriff at the time; for if he had really a right to sell and convey, though out of office, in consequence of having begun to act upon the execution while in office, it would follow, I think, that we should regard him as still clothed with his official authority, looking upon the execution as one entire thing, and referring all to the period when he commenced to act under the writ.

I have no doubt that when it appears, as it does, that the sheriff's deed of the land, which he assumed to convey, was not made upon an actual sale of that land, but only of a part of it, it cannot be nevertheless held to pass the whole, for it could only be good as the completion of a previous sale.

The judgment and fi. $f\alpha$. would be immaterial to the validity of a sheriff's deed, if no sale need be shewn to have taken place, or rather if it could be held of no consequence to be shewn that there really had been none. That is an indispensable connecting link in the chain of title from the judgment to the sheriff's deed. The objection here is not what a common vendor of his own estate might attempt to urge, that he did not mean to convey what he has conveyed—it is, that the sheriff, acting under a power which authorises him to make a deed of a debtor's land which he has sold, has made a deed of land which he did not sell, and thus assumed to convey land which he had no authority to convey.

Then as the deed, which has thus been illegally made, cannot be allowed to pass all the land which it pretends to pass, it is to no purpose to inquire whether it could not have been upheld for that portion of the land which was sold, if that portion had stood in the deed as a parcel distinct from the other, to which the objection applies; for the fact is, that the description embraces one tract only, not several distinct tracts, in regard to which it could be shewn, that one of them had been actually sold and the other not. The whole is mixed together. There is no foundation for the admission of parole evidence, that can detach one part from the rest, as standing under different circumstances.

Even with the parol evidence that was given, we cannot see how the tract described as one, should be divided, so as to make the deed operate legally on one part, and leave it inoperative on the other. It is like the case of general damages, given upon a declaration that contains some counts good and some counts bad, without any certain means of determining what proportion of the damages should be maintained on the good counts.

Such a deed may yet be made as will be consistent with the sale; and if it shall be, then the question may be brought up, whether, under the circumstances the sale made by Mr. Jarvis can be upheld. On that point, I think it better not to express an opinion at present, particularly as the jury did not come to a conclusion on the essential point, whether there had or had not been an inception of the execution by Mr. Jarvis while he was in office—a point on which they must be pressed to determine one way or the other, before the case can be satisfactorily disposed of.

At present I am inclined to think that the recital in the late sheriff's deed may be relied on as some evidence of that fact, though open to be controverted.

MACAULAY J.—I am disposed to think, 1st. That it ought to have been left to the jury to say whether the defendant obtained possession from the tenant of plaintiff's lessor during the term surreptitiously, collusively or fraudulently, in which event, though he had otherwise a good title, it would seem to preclude his setting it up until possession was restored.—4 M. & S. 347; 2 A. & E. 17; 3 A. & E. 188; 4 N. & M. 25; 9 C. & P. 254.

2ndly. That the deed having been drawn by the defendant, and executed by the ex-sheriff without perusing it, and embracing, as proved by the ex-sheriff, more lands than he sold, the whole being described as one unbroken tract, and there being nothing on the face of the deed, nor elsewhere in writing, to distinguish the portion actually sold from the excess which the deed confessedly includes, I apprehend a deed so

executed must be looked upon as inoperative and void, as against the plaintiff's lessor, so far as respects the undefined excess, and being void in part is void in toto, in the absence of anything distinctly separating and distinguishing between what was sold and intended to be conveyed, and what was not.

It bears analogy to the case of an award bad in part and good in part, which may be upheld when the good and bad portions are separable on the face thereof, but otherwise, when both portions are so blended together as to prevent this discrimination; and so of a promissory note or other instrument partially invalid, and void to an undefined extent.

3rdly. That to support a sale by an ex-sheriff out of office, it must appear that while in office he acted upon the writ to an extent, amounting in law and fact to an incipient step in the execution of it, and duly followed up such step after leaving the office; and that the mere receipt of the writ while in office would not of itself be sufficient, because if not acted upon, it became the duty of the retiring sheriff to hand it over for execution to his successors, by stat. 20 Geo. II., ch. 37; Watson on Sheriff, 21. Of course, if the writ had expired and was returnable before anything was done under it, the ex-sheriff could not, after the termination of his office, act upon it.

As to what step will be a sufficient commencement of the execution, the question here, is not whether a sheriff continuing in office can legally sell lands after the return day of the writ, if not returnable within a year after its receipt, without having previously done anything towards its execution, but whether a sheriff out of office can otherwise do so?

I think he cannot, and by analogy to similar proceedings against goods and chattels, which is the analogy afforded by the 5 Geo. II., ch. 7, I think the ex-sheriff must while in office have done that, which would in its effect be equivalent to a scizure of the goods under a f. fa.; although a ft. fa. binds the goods from its teste for some purposes, and its receipt by the sheriff for others, still it does no more, and may be abandoned and other process be substituted before execution; but whenever a levy or service is made, that cannot be done.

Miller v. Parnell, 2 Marsh. 78; 6 Taunt. 370; where the sheriff had taken possession of a mine, together with the implements for working it, belonging to the defendant, which the plaintiff afterwards abandoned and resorted to a ca. sa., which ca. sa. the court set aside.

Wilson v. Kingston, 2 Chit. 203; where a lease was returned on hand for want of buyers; and it must be returned before ulterior process can issue—1 Gale, 48; Gardner v. Cover, 3 Dowl. 424; and moreover a seizure is looked upon as an execution of the writ, on the principles, that it is indivisible, and being commenced must be completed—the levy or seizure being the principal thing, and a sale afterwards only subsidiary or consequential to raise the money.

The legal effect of seizure is, that the debtor is discharged and may plead to an action on the judgment, or make it the ground of an audita querela.—Clark v. Withers, 6 Mod. 295; 2 Lord Ray, 1074; Rol. Ab. 893-4; Jeanes v. Wilkins, 1 Ves. Senior, 195; 1 B. & A. 210; 2 Saund, 47 (a).

So as to lands, some notorious overt act, as entry and symbolical seizure, or perhaps a public advertisement in a gazette, should evince

that the process was executed on certain lands; and it should be so far open and material towards the execution of the writ, as to enable the debtor to avail himself of it as a levy and defence against other process, until the writ against lands had been returned, &c.

For this purpose, I think, an entry and formal seizure or an inquest by a sheriff's jury, or perhaps advertising in the Gazette or otherwise, according to the statute 1 Geo. IV., ch. 1, sec. 20, would do.

MCLEAN, J., and DRAPER, J., concurred in discharging the rule.

Per Cur.-Rule discharged.

MCNEIL V. TRAIN.

The mere allegation in the plea, "of a surrender of a term of years to the defendant by the plaintiff," makes it incumbent on the defendant to prove an actual surrender made by the plaintiff, by deed or note in writing sufficient under the 3rd clause of the Statute of Frauds.

Where the surrender relied upon, is one produced by act and operation of law, it must

be so pleaded.

A defendant in an action of trespass, failing to prove the surrender of a term of years from the plaintiff to himself, upon an issue arising out of a plea of liberum tenementum—may nevertheless consistently hold a general verdict upon another issue, denying the close to be the close of the plaintiff To support an action of trespass, upon the plea of the close not being the close of the

plaintiff, the plaintiff must prove an actual and immediate occupation of the locus in

Where A has once given peaceable possession of land to B.—A by re-entry without B.'s consent cannot acquire a possession such as will entitle him to bring an action of trespass against B.
Under the plea of the close not being the close of the plaintiff, the question of posses-

sion is a fact for the jury.

Plaintiff declared in trespass quare clausum fregit.

Pleas, 1st. Not guilty.

2nd. The close not the close of the plaintiff.

3rd. As to part of the trespasses liberum tenementum.

4th. Liceuse.

5th. As to damaging and destroying the seed-wheat and seed-potatoes of plaintiff, sown in the close, liberum tenementum.

Plaintiff joined issue on the first and second pleas.

To the third plea, he replied that defendant held only an interest under one Somerville, and that before defendant had anything on the third close, and before the trespassers, viz., 1st March, 1845, the close was the freehold of Somerville, who demised to plaintiff for three years, who entered and was possessed under the demise, when defendant committed the trespass, &c.

To the fourth plea, plaintiff replied de injuria.

To the fifth plea, plaintiff applied as to the third plea.

Defendant rejoined to replication to the third and fifth pleas, that after the demise by Somerville to plaintiff, defendant became seized in fee of the reversion by bargain and sale from Somerville; and that whilst defendant was so seized, and before the trespassers, viz., on, &c., the term and interest of plaintiff was "determined by surrender thereof, "made to the defendant by the plaintiff."

Plaintiff surrejoined, that all the estate, term and interest of plaintiff in. &c., was not determined by surrender in manner and form, &c.

It was proved at the trial, that the alleged trespasses were committed in the spring of 1845. The plaintiff had been living three or four years on the land, from all that appears, without any title, or privity with the owner; then hearing that Somerville had acquired the title to the land, he had negotiated with him for permission to live on it, but there was no definite agreement come to.

In the spring of 1846, he was putting in a small crop of wheat, which the defendant would not suffer, but destroyed, by falling trees upon it. It was for this and other conduct of the defendants, evidently designed to drive him from the place by preventing his making any use of it, that plaintiff sued in this action.

Plaintiff still lives in the house, though he has been hindered by defendant from cultivating the land.

For the defendant it was proved, though not by proper legal evidence, that he had purchased the land, of which this plaintiff and others were at the time in possession; that he went to the plaintiff in March, 1846, and acquainted him with his being the owner, and that plaintiff in consequence said he would give up the land, and allowed defendant to move into the house in which the plaintiff was living; that while they were thus living there together, plaintiff worked for defendant on the place, splitting rails, &c., and that he frequently applied to defendant to lease the land to him for some years. It was sworn by several witnesses, that the plaintiff had admitted, about the time of the alleged trespass, that he had given up possession of the place to the defendant.

The learned judge instructed the jury that the question for them was, whether the plaintiff had relinquished the possession of the land to the defendant; that if he had, they should find for the defendant; but that, on the contrary, if, as the plaintiff contended, he had only assented to the defendant's coming to live with him in the house, as a favor, and had not given up to him the possession of the land, then the plaintiff was entitled to recover.

The jury found for the defendant on all the issues—leave being reserved to the plaintiff to move to enter a verdict on the third and fifth issues, if the court should think there was no evidence to support those pleas.

Alex. McDonell obtained a rule for a new trial on the law and evidence, and for misdirection.

A verdict has been rendered for the defendant upon all the issues. With respect to some of them, there can be no question that the verdict for the defendant is bad. Upon the general issue and upon the plea of license—the evidence is such as to leave the learned counsel on the other side no argument upon which to support his verdict, and it is presumed that he will offer none. There is no evidence whatever to prove a license to commit the trespasses complained of; but even if there was, its revocation before the trespasses is undisputed. That a trespass was committed—which is all the plaintiff has to prove under the general issue—is beyond all doubt.

Then with respect to the 3rd and 5th issues. The simple fact to be determined upon the surrejoinder, arising out of the line of pleading adopted upon the 3rd and 5th pleas, is this. Has there been such a surrender of the lease by the plaintiff to the defendant, as will support the

surrender mentioned in the defendant's rejoinder? This is the only question; for whatever doubt there may be upon the validity, either of the defendant's title or of the plaintiff's lease, both the one and the other will be found to have been admitted by the parties in the line of pleadings they have each respectively adopted, to bring out the issue of a surrender. It will be important, then, to refer to the very words in which the issue upon the surrender appears upon the record. The defendant rejoins, "that after "the demise by Somerville to plaintiff, defendant became seized in fee "of the reversion by bargain and sale from Somerville; and that whilst "defendant was so seized, and before the trespasses, viz., on &c., the "term and interest of plaintiff was determined by surrender thereof made "to the defendant by the plaintiff."

The plaintiff surrejoins, "that all the estate, term and interest of "plaintiff, in, &c., was not determined by surrender in manner and "form, &c."

Now, upon these issues, the plaintiff should have had a verdict upon two grounds. 1st. Because the evidence does not shew a surrender in law upon the facts. 2ndly. Because even if it did, it would not have been sufficient: as nothing but a surrender by deed or by note in writing could legally prove the surrender, as it is alleged in the rejoinder. that the defendant can contend is, that facts were proved, from which the defendant might infer an intention by the plaintiff to surrender the term. No act on the part of the plaintiff was shewn, which being necessarily in law a surrender would of itself estop the plaintiff from denying it. But it is clear this act alone amounts to a surrender by operation of law. The intention of the parties, if at all open to explanation, will not work such a surrender. The case of Lyon v. Reid, 13 M. & W. 305, is express upon this point. The judgment will be found to be an elaborate one, overruling, or at least explaining, the somewhat contrary dicta in 2 B. & Ad. 119. The defendant has therefore failed in proving a surrender by operation of law. Supposing, however, he had proved some act of the plaintiff, upon which a surrender in law would necessarily attach, still he could not have succeeded, for the issues require a surrender by deed. If the defendant had relied upon a surrender by operation of law, he should have pleaded such a surrender in express terms in his rejoinder; not having done so, he must prove a surrender by deed-3 Chitty, Pl. 208-this he did not attempt to do. either way, therefore, the verdict must be for the plaintiff on both these

Then with respect to the 2nd issue. If, as is now assumed, a verdict should have been rendered for the plaintiff on the 3rd and 5th issues; a verdict for the plaintiff on the 2nd issue will follow as a legal consequence, otherwise there will be an inconsistency in the record, upon the finding of these several issues. The defendant, by putting in issue the surrender of the plaintiff's lease in the 3rd and 5th issues, admits, in case of failure, a subsisting term in the plaintiff. But a subsisting term in the plaintiff admits his possession—and possession being all that the plaintiff is required to prove under the 2nd issue, he is, if entitled to a verdict under the 3rd and 5th issues, legally entitled by that very verdict to a verdict on the 2nd issue. The plaintiff should therefore have a verdict upon all the issues joined.

J. Bell shewed cause. The verdict for the defendant is consistent with the evidence. Admitting that the learned counsel is correct in all that he has said upon the 1st, 3rd, 4th and 5th issues—still if a verdict has been rightly found for the defendant on the 2nd issue, he must be held to have succeeded in his defence, and to be entitled to the postea.

And first, with respect to the 2nd issue as it stands alone upon the record, without any reference to its bearing upon the 3rd and 5th issues. Upon this issue the plaintiff must prove an actual bona fide possession of the land. Now what are the facts? That the plaintiff being in possession of the land, as a squatter, agreed to recognize the defendant's title to the land, giving him peaceable possession of the farm, and of a cottage he had built upon it—that he engaged with the defendant to work upon the farm and did work it, and offered to lease it from him-that after thus willingly and openly transferring the possession to the defendant, he thought proper, from some reason or other, to commence acts of ownership on the land, by sowing wheat, &c., which the defendant endeavoured to prevent by felling timber upon the crop-upon which the plaintiff brought this action. Can these facts be said to give that kind of possession which the law requires, in order to sustain trespass? The plaintiff, it is true, was in possession of the land in one sense, but he was not so bona fide, but tortiously, as against this defendant; the possession he had gained was never acquiesced in by the defendant, but repelled as soon as it was asserted. The case of 12 A. & E. 624, shews that a bare possession per se, without reference to the mode of acquiring it, will not support trespass.

But independently of the facts, is there anything in the 3rd and 5th issues, supposing them to have been found for the plaintiff, legally irreconcileable with a verdict for the defendant on the 2nd issue? It is submitted that there is not. It is true, an outstanding term for years is admitted by these issues to be in the plaintiff, still subsisting at the time of the trespass, and not surrendered; but that fact clearly does not necessarily shew a possession on the part of the plaintiff for the purposes of this action. A party, though he have a subsisting lease, may nevertheless transfer his actual and immediate possession to another; the term in one and the possession in another are perfectly consistent; and this being so, the whole argument upon that point falls to the ground.

The jury then having found the possession to be in the defendant—and such finding being clearly consistent with a verdict for the plaintiff on the 3rd and 5th issues—the verdict upon the 2nd issue should be allowed to stand—and the defendant will thus be entitled to his judgment upon the whole record.—6 B. & C. 703; 2 B. & Ad. 119; 2 Star. 408; 2 Moore, 262; 11 A. & E. 34; 3 P. & D. 5.

ROBINSON, C. J.—I think that so far as regarded the ground of the action, the evidence well supported the verdict; for whatever may really be the truth of the matter, it was distinctly sworn by several witnesses that the plaintiff had given up the possession of the place, acquiescing in the defendant's right to enter and occupy it under his alleged purchase.

Whether that was so or not, was fairly left to the jury, and we cannot say that they erred in coming to the conclusion which they did, for there was certainly evidence quite sufficient, if credited, to establish that fact.

Then it remains to be considered how the pleadings apply.

The evidence supports the verdict for plaintiff on the general issue, because acts of trespass were proved.

On the second plea, that the close was not the close of the plaintiff, the verdict is rightly found for defendant, if plaintiff did not dispute, as he seems not to have done, the grounds on which defendant claimed to possess the place as purchaser. He yielded to defendant's claim when he advanced it—admitted his right—proposed to take a lease from him—let him go into possession; and the defendant's possession was sufficient, upon the evidence given, to raise the presumption of legal seisin against plaintiff, as in other cases.

The fourth plea, of license, was so far proved, that if the defendant's witnesses were believed, the plaintiff had assented to defendant's occupying the land as owner; but I do not think the defence of license can be so applied. Clearly, the particular act complained of—the falling the trees upon the plaintiff's wheat, which plaintiff had sowed, was not done with plaintiff's leave. If defendant could do it legally, it could only be by virtue of his title, and taking plaintiff's admissions as sufficient evidence of title as against this plaintiff, yet there certainly was no license from plaintiff to defendant to destroy the plaintiff's crops if they were plaintiff's. If they were not plaintiff's, that fact would constitute a defence on another ground.

Then, as to the third and fifth pleas, which are the defence of liberum tenementum, pleaded to different portions of the trespass; under those the defendant would be required to prove a freehold title in himself; but the plaintiff having replied to them, admitting the title to be in the defendant, but resting on a demise from Somerville, the previous owner, unexpired at the time of the trespass, the issue is joined upon an alleged surrender of that demise to the defendant by the plaintiff. All that the jury had to try on that issue was, the fact of surrender. It is pleaded, "that before the said time when, &c., the plaintiff's term was determined by surrender thereof, made to the defendant by the plaintiff."

The form of the surrejoinder, in my opinion, made it incumbent on the defendant to prove an actual surrender, made by plaintiff by deed or note in writing, sufficient under the third clause of the Statute of Frauds. Whenever a party in a plea relies on a surrender as being produced by act and operation of law, I find it is so pleaded; and that seems to be required by the strictness which is necessary in a plea.

Then as to the effect of what was proved, and whether it really didwork a surrender in law, we cannot, I think, hold that it did, after the judgment in the Exchequer in Lyon v. Reed, 13 M. & W. 288, cited by Mr. McDonell in his well-supported argument on that point, and the extent to which the authority of Thomas v. Cook, 2 B. & Al. 119, was shaken by that judgment. The argument and judgment in Lyon v. Reed, was very elaborate, and the attention of the court was deliberately given to the previous decisions. The present case would strongly shew the reality of the danger pointed out in that judgment of treating such acts in pais as surrenders in law; for here the admission of defendant into possession by plaintiff, while both remained together in the same house, living on the land demised, and both performing labour upon it, was an equivocal act requiring aid from other evidence, before it could safely

lead to the conclusion, that such possession of the defendant was inconsistent with the continuance of the tenancy. In truth, the defendant did rely here upon parol evidence altogether, to shew with what intention and for what purposes he and the plaintiff were respectively in possession.

On the whole, I think, that strictly speaking the plaintiff should have a verdict on the general issue, and on the third, fourth and fifth pleas, because he proved the acts done that he complained of, and defendant did not make out the license relied on in the fourth plea, nor the surrender upon which the issue on the third and fifth pleas turned; but on the second plea, I think defendant was entitled to succeed, for the evidence warranted the jury in finding that the close was not the close of the plaintiff, in such a sense as to entitle him to maintain trespass, provided they believed what the evidence tended to establish—that the defendant was living on the place at the time, as owner, and entitled to immediate possession, by the acknowledgment of the plaintiff, and actually enjoying it with his assent. If that were so, then so far as that line of pleading is considered, the plaintiff was not in a condition to maintain trespass to the close, while so in the occupation of another, and not in his, the plaintiff 's.

Then comes the question, how the verdict for defendant on second issue can be reconciled with the verdict for plaintiff on the third and fifth.

As it would have stood on the second plea alone, the verdict would establish that the close was not the close of the plaintiff at the time, in such a sense as to enable him to maintain trespass for entry into it, which it would not be (although the estate might be his) if another at the time was with his assent occupying and enjoying it, though without actual title.

But the verdict on the third and fifth issues, taken in connection with the pleadings, establishes that plaintiff was possessed of the premises as tenant under a demise when defendant committed the trespass; or rather, if we follow that line of the pleading to a conclusion, it establishes that the term was not surrendered, and therefore that plaintiff remained tenant for a term not yet expired, though it may have been consistent with that fact, that he was not in possession under it, and in a condition to bring trespass, by reason of his having yielded up the actual possession of the land to the defendant, which there certainly was sufficient evidence to prove.

It must appear, that the plaintiff was in actual and immediate possession of the land, in order to maintain trespass; whereas here, according to the defendant's evidence, he had relinquished the possession and use of the land to defendant, to be exercised by him as the owner: and we cannot treat his act of going on the place to plough, as placing him again in quiet and exclusive possession—as a resumption of possession by him—because that was a mere aggressive act as it would seem, promptly repelled as a trespass, before it could ripen into possession.

Looking at the issue in the second plea, as we must, in connection with the evidence only, and not with the other pleadings, it does not appear to be made out that plaintiff had at the time any rightful estate to which we might refer his possession, for the terms on which Sommer-

ville proposed to give him a short lease, seems never to have been settled. It was a mere negotiation, and the case upon the evidence appears to be no other than this (looking now only at the second issue)—McNeil, wishing to occupy the place, goes to Sommerville, while he owned it, or sends a friend to him, and is told that he may have it for three years, on condition of doing work in clearing and improving, not specified, and Sommerville was to go afterwards to the place and tell him what he should do, in labor, to stand as rent. Before any agreement on that head was made, Sommerville sells the fee to Train. We cannot hold that McNeil had then a legel term, for no rent had been settled; the contract was imperfect till that was done. He was a tenant-at-will only—the sale to Train put an end to the will and cut the matter short. Sommerville could not after that make an agreement about the rent, or interfere further. There was nothing done that was binding on Train.

Now Train goes and finds this plaintiff and others living on his land, without his knowledge, for all that appears; and certainly, so far as this plaintiff is concerned, without any contract made with him or binding upon him. He demands of McNeil to go out: that might be a hardship, if McNeil had cleared land on the confidence that Sommerville would give him a lease on certain terms. If he did this imprudently, till he got his lease settled, he was to blame for that imprudence. Train would be acting harshly, in turning him off without allowance of any kind, but we could not prevent that by law.

Then it is proved that McNeil gave him up possession of the land expressly, and was allowed to remain in the house working for Train on the land, but on the understanding that he was to have no possession of the land. This is what the testimony of some of the witnesses proves.

Then after matters had been for a considerable time in this state, McNeil seems to have repented of his having let Train into the possession of the land which really was his, and which he had a right to possess, and he began to cultivate and sow it. That was a trespass on the actual possession of Train, held up to that time with McNeil's acquiescence and consent—and a possession consistent with the legal title; and it seems that Train, as soon as he found he was doing so, felled trees on the land which McNeil was sowing, by way of asserting his right, and compelling the other to desist. That act of Train's cannot be treated as a trespass against the possession of McNeil, who was not by his own act of trespass clothed with the peaceable possession, so as to enable him to treat Train's entry as a trespass. I refer to Brown v. Dawson, 12 Ad. & Ell., 628, and to 1 M. & G. 648, as bearing on that point.

The plaintiff was entitled to a verdict upon all the issues but the second, and the defendant upon the second; and I understand that, according to the consent at the trial, the verdict may be entered according to the conclusion which the court has come to.

MACAULAY, J.-1. The trespass being clearly proved, the plaintiff was entitled to a verdict on the general issue of not guilty.

- 2. So also on the plea of leave and license; for so far as ever given, if at all, it was clearly revoked, and the acts complained of had no such sanction, express or implied.
 - 3. The lease for three years, which is admitted in the pleadings that

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form the third issue, was not surrendered by operation of law according to the cases cited on the argument.

5. My difficulty has been in disposing of the second issue; that is, that the close was not the plaintiff's close. In support of this issue it was competent to the plaintiff to prove possession merely, and rely upon it as sufficient to entitle him to maintain the action against the defendant, who setting up no title in himself must be regarded as a wrong doer, if the plaintiff established a sufficient possession to maintain trespass against a wrong doer; or he might fortify his possession by proof of title, shewing that the close was his both in respect of title and possession; but of course, whether well entitled or not, possession was essential to be shewn.

In order, therefore, to prove that the close was his, and that he was possessed thereof, the evidence in effect seems to be, that two years before the time when, &c., the plaintiff being then in possession sent a friend to Mr. Somerville to lease the locus in quo if he had a title; and that Sommerville agreed to let the plaintiff remain upon the place for three years, saying he would go up the next day or the day after and point out what he should do on the land for the use of it. Sommerville was not called as a witness, nor was it shewn whether he did go up and point out what the plaintiff was to do or not; nor was it made a question with the Jury, whether he (Somerville) had so pointed out or not, but it appeared that the plaintiff had continued to reside on the premises, had built a small house, and made some clearing and improvement.

Though it is admitted in the pleadings raising the third issue, that the plaintiff was the tenant of Sommerville for three years, still it is only so for the purposes of that issue, and if material in support of the second issue, it should be proved. Now if the evidence proves a demise for three years, and nor merely an agreement for a lease, I have no doubt of the plaintiff's right to recover on this issue; because in that event he would shew title, right to possession, and possession in fact, however recent, in opposition to any anterior possession of the defendant; he would, in short, (admitting that he had assented to the defendant's going into possession) come within the principle of Butcher v. Butcher, 7 B. & C. 399; and 1 M. & R. 220; and Hay v. Moorhouse, 6 Bing. N. S. 52, 60.

His term not having been surrendered, but subsisting, he would have a legal right to enter, and it is clear that he had entered and was in possession of the field in question, sowing seed, and so possessed adversely and in opposition to the claim of the defendant to be possessed or entitled. But on this issue and on the evidence it forms a question, whether the facts establish more than an agreement for a lease, in which event Sommerville could have ejected him at any time, or by conveying the estate to the defendant have empowered him to do so.

Without a rent reserved, it would not seem to be a valid lease within the Statute of Frauds, 29 Car. II., ch. 3, sec. 2, which excepts only leases not exceeding three years from the making thereof, (1 Lord Ray. 736,) whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised. Still it was an agreement for an interest in land, (Inman v. Stamp, 1 Star. N. P. C. 12; 5 A. & E. 856; 1 C. & J. 391; 7 A. & E. 49,) and as such ought regularly to have been in writing, at all events it was inchoate and

not a perfect lease, consequently only an agreement for a lease, and plaintiff only a tenant at will. As tenant at will, Sommerville could have entered at any time on determining his will.

Then the evidence and defence in effect are, that the defendant came to plaintiff and represented that he was the purchaser and owner under Sommerville, and wanted possession; and that the plaintiff, recognizing or acquiescing in his paramount right, actually surrendered the possession to him and assented to his entry, whereby defendant was in actual possession of the locus in quo, which possession the plaintiff was at the time when, &c., striving to resume, wherefore the defendant resisted him; that defendant's acts were, in short, in defence of his own possession of the close; and that plaintiff was not possessed thereof, as he was bound to prove on this issue.

My own impression from the notes of evidence is, that the weight of evidence is to shew, that in point of fact the plaintiff was in possession at the time when, &c., and not the defendant; but it was left to the jury, who found for the defendant; with such finding the learned judge who tried the cause is satisfied, and the Chief Justice approves of it.

The case of Brown v. Dawson, 12 A. &. E. 624; 4 P. &. D. 325, and 7 Jurist, 722; 12 Law Jour. Q. B. N. S. 308, certainly goes far to establish, that under the circumstances it was a question of fact for the jury, whether the plaintiff or defendant was possessed. My difficulty is, that under this issue the defendant "sets up no title, nor could he be admitted to prove it if he had any; all he could regularly do, was to contest the plaintiff"s alleged possession as against a wrong-doer; (2 Bing. N. S. 98; 8 A. &. E. 138; 5 Q. B. 146,) but of course he could shew that he was himself possessed and not the plaintiff.

Neither party shewed a legal title: it depended therefore upon the mere question of possession, and considering the plaintiff's undoubted possession under Sommerville, the way in which the defendant acquired such possession from him, so far as he ever was at any time possessed of the locus in quo, and the plaintiff's resumption thereof, the weight of evidence seems to me to be in favor of the plaintiff. I'must believe, however, considering the opinion of the rest of the court, that the opposite view is the soundest under all the circumstances appearing in evidence.

JONES, J.—An act amounting to a trespass, if done without license or justification, having been proved to have been committed by the defendant upon the *locus in quo*, the verdict should have been for the plaintiff on the general issue.

The second issue is properly found for the defendant. To support a verdict for the plaintiff on this plea, viz., "that the close is not the close "of the plaintiff," the plaintiff was only required to prove actual possession in himself at the time of the trespass, as against a wrong-doer.

The facts as regards the possession are these: the plaintiff took possession of the locus in quo, 50 acres of lot 27, in the 9th Concession of Vaughan, without claiming title, as a squatter, a term well understood in this country. Learning that one Sommerville was the owner of the lot, he applied to him for a lease, and Sommerville agreed to let him occupy the land for three years, and said he would go to the place for the purpose of determining what the plaintiff should do upon the land, by way of payment for the use of it. He never did so, and nothing ever passed

between the plaintiff and Sommerville upon the subject. Sommerville subsequently sold the whole lot to the defendant. Defendant called upon the plaintiff, and told the plaintiff that he had purchased the lot and wanted possession. The plaintiff, aware that he had no right to retain possession against the owner, not having any title to the land, and no lease having in fact been given to him by Sommerville, agreed to give up possession of the land to the defendant, but refused to go out of the house, as he said he had himself built it, but at the same time consented that the defendant's servants should occupy the house with him. defendant's servants lived with the plaintiff in the house; the defendant took possession of the land, and chopped upon it, and cut saw-logs; plaintiff himself working on the land under the defendant, splitting rails for the defendant on a contract. Plaintiff desired to lease the land from the defendant, but no lease was given by the defendant; and in the spring the plaintiff remained, clearing up a piece of the land, and sowed a small quantity of wheat. When the defendant discovered this, he went to the field and chopped and fell trees on the land to prevent the plaintiff from occupying it, and to destroy his crop; and this is the trespass for which the action was commenced.

The owner of the land, Sommerville, before the sale to the defendant, and the defendant afterwards, had a right to the possession; and an action of ejectment could have been maintained against the plaintiff, without perhaps a demand of possession, but most certainly after a demand. Upon such demand of possession by the defendant, the plaintiff, instead of waiting for an action of ejectment, surrendered the possession of all but the house to the defendant. When he afterwards attempted to recover possession, he was a trespasser, and an action of trespass could have been brought by the defendant for such act. If, therefore, an action of trespass could be sustained by the defendant against the plaintiff for entering upon the land, such entry could give him no possession such as would enable him to sustain an action of trespass against any person much less the person whom he admitted to be the owner of the land, and to whom he had himself surrendered possession.

The case of Brown v. Dawson et al., 12 Ad. & Ell. 624, is an expressauthority against the plaintiff in this action. In that case the plaintiff, a school-master, had voluntarily surrendered the possession of the schoolroom to the trustees, upon his dismissal from office by them upon an alleged disregard of rules. The trustees could not have obtained possession without ulterior proceedings, except by consent of the plaintiff; the surrender by the plaintiff was on the 29th of June, and on the next day, the 30th, the plaintiff resumed possession, by breaking the padlocks and re-entering. On the 4th July, he had notice from the trustees to give up possession, and on the 11th was ejected by the defendants, and for that alleged trespass the action was brought. A verdict passed for the defendants on the plea. On a motion for a new trial, it was contended, that the trustees could not summarily turn him out, without calling upon him for his defence. This Lord Denman, C. J., admitted, but said, "if "he chose to go out rather than wait for such a proceeding, that alters "the case; and after he had consented to withdraw and left the premises, "his returning to them, and taking off the padlock and remaining a "certain time, would not restore him to possession." In giving judgment,

his lordship says, "a mere trespasser cannot by the very act of trespass, "immediately and without acquiescence, give himself what the law "understands by possession against the person whom he ejects, and drive "him to produce his title, if he can without delay reinstate himself in "his former possession. Then by the acquiescence of the plaintiff, the "defendants had become peaceably and lawfully possessed, as against "him; he had re-entered by a trespass; if they had sued him for that "trespass immediately, he certainly could not have made out a plea deny-"ing their possession. What he could not have done on the 1st of July, "he could as little have done on the 11th, for his tortiously being on the "spot was never acquiesced in for a moment; and there was no delay in "disputing it. But if he could not have denied their possession in the "action supposed, it follows clearly that they might deny his in the "present action, for both parties could not be in possession."

So in the case under consideration, the defendant had become peaceably and lawfully possessed as against the plaintiff, the plaintiff having given possession to the defendant; the defendant had re-entered by a trespass; his tortiously being on the land was never acquiesced in for a moment; and there was no delay in disputing it.

Upon the 3rd and 5th issues the plaintiff is entitled to a verdict; and the admission of the lease upon the pleadings involving those issues, does not affect the right of the defendant to recover upon the facts proved under the second issue.

Upon the 4th issue, on the plea of license, the defendant is entitled to recover. The evidence shews that the plaintiff gave possession to the defendant, and told him to cut trees and do what he pleased with the land.

McLean, J., gave no judgment.

DRAPER, J., being in the Practice Court during the argument gave no judgment.

> Per Cur. - Postea to the defendant on the 2nd issue, and verdict to be entered for the plaintiff on the 1st, 3rd, 4th and 5th issues.

UPPER V. McFARLAND ET AL.

The commencement of an action may be proved by the production of the writ of ca re.

The minute of the Clerk of the Crown, or his deputy, on the writ, marking the time of its issuing is, prima facie proof of the fact.

Held. per Cur. that the following notice of action—"and also, for that you on the day "and year aforesaid, with force and arms, &c., and at the township of Thorold, did "cause the horse upon which the said Joseph Upper was then riding to be sized, "taken and led away, and the said Joseph Upper to be obliged to dismount and give up "the said horse, and converted and disposed of the said horse to your own use. And "also, for that you caused the saddle and bridle and halter which were then on the "said horse to be seized. taken and carried away, and to be converted and disposed of to your own use; and other wrongs to the said Joseph Upper then and there did, to "the great damage of the said Joseph Upper of 100t, and against the peace, &c.,"—was sufficient to enable the plaintiff to recover from the magistrates the value of the

horse, as being the property of the plaintiff. ROBINSON, C. J., dissentiente, as to the sufficiency of the notice to sustain the verdict for the value of the horse.

Trespass for false imprisonment, and taking and converting to their own use a horse, saddle and bridle of plaintiff's.

Plea, general issue.

The defendants were justices of the peace, and convicted plaintiff under the statute 4 & 5 Vic., ch. 26, of "a trespass upon the estate of the late "Peter Misner, by taking rails and wood therefrom," and fined him 41., which together with 21. 5s. costs, were levied on the goods of the plaintiff upon a distress warrant.

Exceptions were taken to the conviction, and it was admitted by the defendants' counsel that it could not be supported.

To shew that the action was commenced within six months, plaintiff put in the ca. rc., with the deputy clerk of the crown's minute, as is usual, in the margin, "issued 5th August, 1847. W. D. Miller, D. C. C."

No other proof was given of the time when it actually issued; the writ was tested 26th July, 1847 (last day of term.)

The notice of action was put in and proved to have been served on 1st July, 1847. It stated that an action would be brought against the defendants, for the assault and false imprisonment, and proceeded thus: "and also, for that you, on the day and year aforesaid, with force and arms, &c., and at the township of Thorold, did cause the horse upon which the said Joseph Upper was then riding, to be seized, taken and led away, and the said Joseph Upper to be obliged to dismount and give up the said horse, and converted and disposed of the said horse to your own use. And also, for that you caused the saddle and bridle and halter which were then on the said horse to be seized, taken and carried away, and to be converted and disposed of to your own use; and other wrongs to the said Joseph Upper then and there did, to the great damage of the said Joseph Upper of 100%, and against the peace, &c."

It was objected at the trial, that the writ prima facie must be taken to have issued on the 26th July, when it was tested, and so that the notice being served on 1st July, the calendar month had not expired; and it was denied that the minute made by the officer in the margin of the time of issuing was any legal evidence of the fact.

The jury found a verdict for the defendants as to the false imprisonment, and for plaintiff 211. 5s., on the count for taking the horse.

Cameron, Sol. Gen., moved for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection.

The plaintiff cannot recover for the horse. 1st. The notice is defective, in not stating clearly and explicitly the cause of action. The defendants are not charged in the notice with taking the plaintiff's horse, but merely with taking a horse on which he was riding. There is an ambiguity in the expression quite consistent with the charge of merely using the horse for a temporary purpose, in which case the plaintiff, not being informed that he was to answer for the sale of the horse, could not be entitled to its full value as found by the jury. The notice is also bad in giving no value to the horse, saddle or bridle. —2 U. C. R. 115; 6 Esp. 134; 2 Chitty's Rep. 673.

A second objection to this action is, that a month had not elapsed between the time of giving the notice and the commencement of the suit. This was shewn by the writ itself when produced at the trial, from its

teste. The teste bore date on the 26th of July, 1847, the notice was served on the 1st of July, and the writ was marked by the deputy clerk of the crown as having issued on the 5th of August. Finding that the teste of the writ was against him, the plaintiff relied upon this mark as evidence of the commencement of the action. It is submitted, however, that the teste, and not the officer's private mark in the margin of the writ, is the evidence of the time of its issue. There is no rule of court requiring the time of the issue of the writ to be marked at all. No such words need appear on the writ; they should not, therefore, be received as evidence to support an action, only maintainable, upon the writ being issued within a given time.—2 Burr. 950.

H. J. Boulton, Q. C., shewed cause.

The time of issuing the writ was correctly proved. It has been the invariable practice to prove the time of its issue by the official mark in the margin, as was done in this case. No authority can be cited to shew that the teste is the only mode of proving the time of issuing a writ; and in the absence of such authority, the court will always look, in points of this sort, at their own constant practice, and see that it continues to prevail.

The defendants could have had no difficulty in understanding from the notice, that the plaintiff would seek to recover at the trial the value of the horse, as of property belonging to him which they had sold and converted to their use. Upper, the plaintiff, was stated in this notice to have been riding the horse at the time of the seizure complained of, and the defendants must have taken it to be his own property, otherwise what right could they have had to seize it under the warrant. These notices are not now required to be as rigid in form as they once were; and it is submitted the present one amply satisfies the law, in the certainty with which it is expressed.—5 B. & Ald. 837.

ROBINSON, C. J.—I am of opinion, that the writ was properly received in evidence to shew the commencement of the suit, and that the minute of the clerk of the crown or his deputy on the writ, marking the time of its issuing, is prima facie proof of the fact. It has been long the common practice so to treat it at nisi prius, and as the practice is convenient and saves expense to the parties, it ought to be upheld.

Upon the other point, my brothers are of opinion, that the notice is sufficient, and that will enable the plaintiff to have the benefit of his verdict, which seems to be perfectly in accordance with the justice of the case. My own inclination is to the contrary, seeing the strictness with which the courts insist upon these notices following the statute.

It may be assumed, that so far as regards the declaration in such an action, the objection of not stating the horse, bridle and saddle to be the property of the plaintiff, would be cured after the verdict, as was held in Swallow v. Ayncliffe, referred to in Selw. N. P., 1400, though there are many cases to the contrary; still that is not the point here, but rather whether the plaintiff could be permitted to give evidence of the value of the chattels, with a view to claiming damages for his properly taken, when he had not given notice to the magistrate that he had intended to complain of that injury.

If evidence could not legally be received of it, on account of the 5th clause of the statute 24 Geo. II, ch. 44, then it could not be permitted

to be proved, and of course we could not assume after verdict that it was proved to the satisfaction of the jury.

The notice is required to state clearly and explicitly the cause of action; and the consequence of the alleged defect here would be, not that the plaintiff must be nonsuited, but that he should not be allowed to recover for the value of the property taken, but only for any other "cause of action clearly and explicitly stat d in his notice." I refer on that point to Robson v. Spearman et al., 3 B & Ald. 493.

This notice is not worded, as we might expect it to be, in any case in which a party intended to complain of his goods being taken from him, but had accidentally omitted the word "his." It is a circumstantial description of a peculiar ill treatment—meeting him in the highway, making him dismount, and causing the horse on which he was then riding to be seized, and causing the saddle and bridle which were then on the said horse to be seized, and converting them to his own use.

There seems to be a studied intention to avoid stating the property to belong to the plaintiff, and to limit the complaint to depriving him of the convenience of using them at the time, by taking them and converting them to the defendant's own use. It would be consistent with the language of this notice, if all the plaintiff meant to complain of was, that he, being the mere servant of another, riding his master's horse from one town to another, was rudely treated by the defendants, by their making him dismount, and making use of the horse themselves.

I think the notice should have given the defendants clearly and explicitly to understand, that the plaintiff claimed damages to the value of the property taken, and not merely for the loss of the temporary use of it, or for an aggravated assault.

My brothers' view of it, however, is very probably more correct, and there certainly is an inclination in England at the present day, to consider some of the former decisions on the forms of these notices as having been unnecessarily rigid.

MACAULAY, J.—The cases, I think, warrant us in holding the notice sufficiently explicit to entitle the plaintiff to declare for the taking of his horse. It is described as the one on which he was riding—importing possession, which is prima facie evidence of right and title to such property, and sufficient prima facie to support the declaration upon a plea denying his property therein; and the notice is not only for seizing, but for converting the animal, shewing that the action was to be for both seizing and converting—in other words for the value.—Hard 111; Selwyn, N.P.; Swallow v. Wykliff, 1 Sid. 184: 2 Saund. 47, i. k.; Moore, 671; Latch, 214; 7 T. R. 391.

Then as to the value, no price is named; but that does not prevent the defendant tendering amends according to what he considers the property worth. Had the plaintiff named a value, it would have bound him upon a tender of the amount; but I do not find that the omission of it divests the notice of the character of a clear and explicit statement of the cause of action, which is the seizing and conversion of the horse, saddle, bridle, &c.—Stranger v. Martyr, 6 Esp. 134.

On the importance of naming a value, I would refer to The Mayor of Reading v. Clarke, 4 B. & A. 269, 271; 1 Arch. Nisi Prius, 422-3;

Usher v. Bushel, Sid. 39; Cro. Jac. 129-30; Wood v. Smith, 2 Lev. 230; Strode v. Hunt, Cro. Jac. 148.

1 may further remark, that it is not simply a notice of action for seizing and converting a particular horse, saddle and bridle, identifying only the subject matter, but shewing no right of the plaintiff therein or connexion therewith—but it is a notice of action for seizing the horse on which he was riding, shewing not only the possession, but the actual use of the property; in short, stating facts equivalent to the assertion, that the horse, saddle and bridle were his; and it is not pretended they were not his. Moreover, the very circumstances and purpose of the seizing and conversion assuming that the defendant was sufficiently informed of the transaction of which the plaintiff complained, imply the assertion or assumption of the party seizing that they were his; they were seized and disposed of under a warrant of distress against his property, and unless these notices are to be judged of by the test of a demurrer, I must say it appears to me quite sufficient.

It might as well be said that the notices are bad for uncertainty, when instead of complaining the particulars of a seizure, as by whom, and under what colour of right or pretence the act was done, they merely set forth, that the defendant caused so and so to be done, without anything to indicate for what it was sought to render the defendant responsible; and yet such is not the usual form of such notices. They are usually drawn in general terms—that the defendant caused such and such property of the plaintiff to be seized and converted. In the present instance it is more specific, though it would of course have been more complete if the words "of him the plaintiff," had followed the mention of the horse, &c.

Then as to the proof of the commencement of the action, the question is, whether the writ on production being certified in the margin to have issued on a day different from the teste, is to be taken as sufficient to shew when it issued.

The practice of marking the time of the issue on writs of ca. re. had its origin under the statute 5 & 6 W. & M., ch. 21, sec. 4, and 9 & 10 Will. III., ch. 25, sec. 42; 1 Tidd. 157, which required the officer signing any writ or process to arrest any person, to set down upon such writ or process the day and year of his signing the same. All writs of ca. re., though not bailable, purport to be process of arrest, and the course of practice has become general to note the time of issue on all uniformly, whether bailable or not bailable.

We have a right to notice the practice of the court, and so, I suppose, has a judge of this court at Nisi Prius, trying a cause upon a record of this court, and we know that the teste and issue often differ.—1 Vent. 362-3; 2 Bur. 950; 1 B. & P. 263; 3 Star. on Ev. 1401-2.

Rhodes v. Gibbs, 5 Esp. 163; it being necessary to prove when the action was brought the writ was produced, and it appeared to have been sued out the 21st June, so that in fact the writ was sued out after the cause of action.

Maughn qui tam v. Wølker, Peak, 194; the bill was not filed within the year, and at first the writ was not produced by plaintiff as part of his evidence, but after objection and argument it was allowed;

upon which the writ was produced, and it appearing to have been sued within the year, the plaintiff had a verdict.—4 E. R. 75.

The first of the above cases was before Heath, J., and the last before Lord Kenyon, and as reported, no additional evidence was given of the time when the writs issued, beyond what appeared on the face of them. To be sure, the time of issue may have been taken from the teste, or it may have been noted in the margin. I look upon such note as an official certificate of the officer, made at the time of the issue of the writ, and its accuracy verified under the seal of the court as well as the teste; thus shewing both the teste and date of issue when on different days. It is quite as satisfactory and safe as the viva voce evidence of the attorney, which has been held sufficient.—Lester v. Jenkins, 8 B. & C. 339; 2 M. & R. 429, S. C.

If it were clearly a bailable case, the statute requiring such note would seem to authorize the court noticing it as proof of the fact, and considering the origin and uniformity of the practice, I think we are at liberty to recognize it in all cases; and that it was competent to the learned judge at Nisi Prius to treat the marginal note in this case as sufficient proof of the time of the issue of the writ being a day different from and subsequent to the date of the teste. Gyfford v. Woodgate, 11 East. 297; that faith should be given to the official acts of a public officer.—5 B. & C. 149; 7 D. & R. 729.

The extent of the plaintiff's damages is a distinct question from the cause of action. The cause of action is the seizing and converting the horse, saddle and bridle. The wrongful seizing or tresspass is the gist of the action. The amount of damage is another question; that might depend on the defence. The notice pointed out the subject matter of the intended action, and the defendant might have inquired into the extent of the plaintiff's interest therein; primâ facie he had a right of action for the seizing and conversion to the full value. If anything existed to abridge that right, it was a matter of defence, and if, under the circumstances, it was competent to the defendant to contest the plaintiff's right or property, or to limit the amount of his recovery to the extent of a limited or qualified interest, as bailee or otherwise, he might have done so; still the plaintiff's cause of action was the same, viz., the seizing and conversion of the horse, &c.

JONES, J.—The memorandum of the time of issuing the writ, made by the officer issuing it, has always been understood as unquestioned prima facia evidence of the time the writ issued; other evidence has sometimes been given, which of course would be unobjectionable—such as viva voce evidence of the time the writ was actually issued—or proof of an examined copy of the precipe with the date of filing; but this latter might be open to the objection, that although the precipe may have been filed on a particular day, still the writ may not in fact have been issued till some time afterwards. It is certainly evidence of the time of filing the precipe, but not so clearly evidence of the time of issuing the writ. The practice for forty years of receiving the evidence objected to here, should in my opinion prevail.

The notice of action should "clearly and explicitly contain the cause of action which the party hath or claimeth to have against the justice."

It is objected, that the notice in this case does not state the value of

the horse—uor that it is the property of the plaintiff—and therefore that the plaintiff could not recover the value of the horse.

That part of the notice is in these words, "and also for that you, on, &c., at, &c., did cause the horse upon which the said Joseph Upper was then riding to be seized, taken and led away, and the said Joseph Upper to be obliged to dismount and give up the said horse; and converted and disposed of the said horse to your own use."

At the trial, the plaintiff gave evidence of and recovered for the value of the horse; and I think the notice sufficient to enable him to do so. The statement of the value of the horse, or the damage sustained, was unnecessary. The object of the notice is, to inform the justice of the intention of the party to sue, and to enable the justice to tender amends: the amount to be tendered only rests with himself. It is therefore necessary that the cause of action should be substantially set out.

In Jones v. Bird, 5 B. & Ald. 837, it is stated by the judges in giving judgment, that a notice of this suit does not require the same precision as a declaration—it is sufficient if the cause of action be substantially set out. The only object of the notice is to give the defendant an opportunity to tender amends, and it ought not to be scanned very nicely.

The form required in the statute, as it regards the kind of writ, and the signature to the notice, must be strictly observed.—7 T. R. 835-7; 7 T. R. 631.

The case of Jones v. Bird, I think is conclusive. The notice of action was, that the defendant "made, altered, repaired, cut, dug, worked and enlarged (the sewer,) in so negligent, incautious, unskilful, improvident, and improper a manner, that the plaintiff's premises fell, and were greatly damaged, weakened and destroyed." That was held to be a sufficient notice to sustain the action, though the proof was, first, that the defendant had not propped and shored up the plaintiff's houses in the progress of the work—and second, that the immediate cause of the injury was the falling of other houses, which drew the plaintiff's after it.

If the declaration itself had omitted to allege, that the horse was the property of the plaintiff, it would have been good after verdict, and therefore the notice of action, omitting the allegation, states substantially the cause of action, which is all that is required.

Melean, J.—The object of the notice was, to inform the defendants of the ground of action, in order that they might tender amends. Now when the plaintiff notified the defendants of his intentions to bring an action against them, for causing the horse upon which he was riding to be taken away from him, and converting and disposing of the same to their own use—they could be at no loss as to the ground upon which he intended to proceed, or ignorant of the fact that he would seek to recover the value of the horse in such action. The particular horse is specified for which the plaintiff intended to sue, viz., the one on which he had been riding, and from which the defendants had by their act compelled him to dismount.

It appears to me, then, that more precise information was given to the defendants, than if they had received a general notice that the plaintiff intended to bring an action of trespass against them for taking a certain horse of the plaintiff, and converting him to their own use.—5 B. & Al. 837.

The notice, as it appears to me, was ample to enable defendants to

be fully aware of the cause of action against them, and the intention and object of the statute are sufficiently complied with.

DRAPER, J., being in the practice Court during the argument, gave no judgment;

Per Cur. Rule for new trial discharged.

RIBINSON, C. J., dissentiente as to the sufficiency of the 'notice proved.

DOE DEM. KINGSBURY V. STEWART.

A., in 1817, makes an agreement with B. to purchase land, and is let into possession. B. dies before the passing of the provincial act 4 Will. IV., ch. 1—C., the son of A., makes a bargain with D., the husband of the lessor of the plaintiff, town B. had demised the land, and fails in his payments—upon which an action of ejectment is brought to dispossess him, and is discontinued at his request in 1834—after this, the lessor of the plaintiff enters upon the land as owner, and being satisfied with the promises of payment made by the defendant, consents to her remaining for the present. The defendant makes no payments, and the lessor of the plaintiff brings her action of ejectment. Held, per Cur., under these facts—that A. became tenant at will to B. in 1817—That upon B.'s death this tenancy at will was determined—That that relation being at an end before the act 4 Will. IV., c. 1, was passed, the time which elapsed under such circumstances was not to be taken into account as part of the twenty years necessary to make a title by possession—That the action of ejectment brought in 1834, while it determined—the tenancy at will, gave no new starting point, and had no retrospective operation—That the lessor of the plaintiff, by her consenting to the defendant's remaining on the land after the interview of 1834, revived the tenancy at will—And that as twenty years had not elapsed since that period—the lessor of the plaintiff, was entitled to recover.

Ejectment for lot 11, 4th concession of Matilda. The lot was granted by patent on 29th January, 1803, to Joshua Losee, who, on the 2nd Jan. 1799, made a deed of the land to Thomas Fraser, Esq., and he devised it to his daughter, the lessor of the plaintiff.

It was proved that the husband of the lessor of the plaintiff, who has been many years dead, made an agreement in writing, which was not produced at the trial, to sell the land to Archibald Stewart, a son of this defendant; that he did not fulfil his contract, and sometime between 1830 and 1833, a suit was brought against him by the present lessor of the plaintiff to recover possession, which was discontinued at his request, and upon his assurance that he was going to Quebec with timber, and would make payment on his return; but he left the country then, and has never returned, and is supposed to be dead. The defendant, his mother, who had been living with him, or rather perhaps with whom he had been living, continued to reside on the land.

It was sworn by the agent of the lessor of the plaintiff, that when Archibald Stewart asked him to discontinue the suit, he admitted that he held under her.

The defendant's counsel, at the close of the plaintiff's case, took some objections to plaintiff's title, which were overruled.

The question is, whether the plaintiff's remedy was barred by the Statute of Limitations, upon the following facts which appeared in evidence.

The defendant, a widow, and two sons, one being about sixteen years old, and the other, Archibald, still younger, came to live on the land in

November 1817, the defendant having bargained for the lot with Col. Thomas Fraser, and made him a payment on account. After they had lived there some years Col. Fraser died, and Archibald, being then of age, went to his daughter, the lessor of the plaintiff, to whom the land had been devised, and entered into an arrangement with her for the purchase.

It was proved that there had been a bond given by Col. Fraser to convey the land on certain payments being made, and a daughter of the defendant swore that she had seen it, but that they had searched for it since and could not find it.

It was further proved, that after 1831 the lessor of the plaintiff went with a friend to the defendant upon the land, and she then said that her son Archibald was gone to Quebec with timber, and on his return she thought they would be able to pay for the land; that not long after that, when it was found that her son did not return, being asked by a friend whether she was likely to lose the land, she said that it belonged to Mrs. Kingsbury, and she had promised not to turn her off as long as she lived, as she was a widow.

It was proved also, that about 1833 or 1834, the deputy-sheriff being at the defendant's, cast up for her and her son Archibald, who was present, the amount of their alleged payments, and made the amount of 430 dollars according to the account which Archibald and the defendant gave him. No payments were made after this. The sum to be paid for the land, according to the agreement, was 2007, and interest. The last payment was made about 1832. The payments in general were endorsed on the bond, which the defendant held; for some payments separate receipts were given, and both the bond and receipts were produced by the defendant, when the deputy-sheriff made the computation.

It was objected at the trial, that no verbal admission of the lessor of the plaintiff's title could be of any avail, more than twenty years having elapsed since possession was taken by the defendant; but the learned judge considered, that as it did not distinctly appear that the lessor of the plaintiff was aware till after 1831, when she visited the lot, that any one was in possession of it, the saving in the clause of the provincial statute, 4 Will. IV., ch. 1, might apply to it; and the statute, in that case, would not have commenced till she acquired knowledge of such possession; and at all events, that the verbal admissions of title, being made by defendant before twenty years, had expired, were admissable and were sufficient, especially in this case, where the defendant was clearly a tenant at will from the time of her entry, and when the acknowledgment was within twenty years from the time of her being so permitted to occupy, and also within twenty years of the bringing of this action.

It was consented that a verdict should be given for the plaintiff, subject to the opinion of this court, upon the legal effect of the evidence, as it regarded the Statute of Limitations. Verdict to be entered for defendant, if the court shall think that the verdict for the plaintiff cannot be legally upheld on the evidence. And it was further agreed, that the lessor of the plaintiff should be at liberty to produce any written acknowledgemens of title binding on the defendant, and if verified and considered sufficient by the court, that the same might be taken as

evidence in the cause, and the verdict for lessor of the plaintiff might in that case stand.

Under this consent, there was produced on the argument of this case a letter from Archibald Stewart, signed by him, which the agent of the lessor of the plaintiff swears was received by him, after he had instituted the action of ejectment to dispossess Archibald Stewart, and that he had in consequence of the request contained in it, discontinued that action; he swears that the letter related to the premises now in dispute; it is dated 30th June, 1834, from Matilda. In it Archibald Stewart apologises for his want of punctuality, states that he is just going to Quebec to dispose of a quantity of timber, and adds, "should I not be permitted by the hurry of my affairs to call upon you until my return from Quebec, I wish you to make no more costs upon the suit of Mrs. Kingsbury, as it is my intention to pay up the demand at my return, and should I not be able, I am willing to do all manner of justice in the matter without costs."

In a note at the end he says, "on the receipt of my letter you will "please let me know if you will delay the progress of the suit or not, as "I assure you that I want no person's property unless I can pay for it."

J. Lukin Robinson obtained a rule to shew cause why a verdict should not be entered for the defendant on the points reserved.

There can hardly be much doubt upon the evidence, that the lessor of the plaintiff—or what is the same thing—that her father, Colonel Fraser, well knew that the defendant was in the possession of the lot from the year 1817, when it appears she first entered. The lessor of the plaintiff will not, therefore, it is submitted, under the suggestion of the learned judge at the trial, be entitled to recover within sec. 18 of the provincial act, 4 Will. IV., ch. 1, as one claiming through a grantee from the crown and ignorant of the fact until very recently, of any person being adversely in actual possession of the lot.

Then with respect to the lessor of the plaintiff's title on other grounds. The defendant has clearly been in possession of the lot from a very early period (1817), and has continued in possession from that time to the present; this possession, therefore, will confer a title upon the defendant, unless it has been accompanied by some admission or acknowledgement of title in the plaintiff, sufficient under the 26th sec. of our act 4 Will. IV., ch. 1. Has the defendant then admitted within the last twenty years, not verbally, for that is clearly insufficient, but in writing, the title to be in the lessor of the plaintiff? She certainly has not. It may be contended, however, that her son has; but what authority from her had he to do so? The defendant made the purchase from Colonel Fraser; she entered into the agreement; removed to the place with her two sons, both then minors; made several payments on account, and acted in all respects as the party to become under the contract the subsequent owner of the land. She was, therefore, the only one whose acknowledgement of title in another could defeat her own. Conceding then that her son Archibald has by his letter from Quebec admitted the lessor of the plaintiff's title, he can only be considered as having done so in the character of the defendant's agent; but it is submitted, that before his admission could have availed the plaintiff, she must have shewn him to have been the agent of the defendant duly appointed in writing for that

purpose. There is no proof of this; and the consequence must be, that the admissions of the son being unauthorised, they cannot have the effect of bringing the lessor of the plaintiff within the benefit of the 26th sec. of our Real Property Act. The action of ejectment brought against the son in 1834 is immaterial. It is true it put an end to the then existing tenancy at will; but in doing so it is equally true, it gave no new starting point to the plaintiff. Doe Ausman v. Minthorne, 3 U. C. R., 423, is express on this point. The defendant is therefore entitled to a verdict—having acquired a title by a twenty years' possession—under our statute 4 Will. IV, ch. 1.

P. M. Vankoughnet, with whom was McDonell of Greenfield, showed cause.

The justice of this case is manifestly with the lessor of the plaintiff. The defendant has paid but a small portion of the purchase money, and is now attempting to get rid of the balance still due, by claiming through her possession, a title under our act 4 Will. IV., ch. 1. The facts, however, fortunately for this plaintiff, shew the possession to have been of such a character as not to make it available in proof of title. In 1817 the defendant went into possession, under a contract to purchase from This possession then made her a tenant at will. Colonel Fraser. Colonel Fraser died before the passing of our act 4 Will. IV., ch. 1-and his death put an end to this tenancy; but dying before the act was passed, no time can be said to have run, as against this plaintiff's title, upon the defendant's possession. Then what was the position of the parties at the time of the passing of the act? While the defendant was in possession, about the year 1834, this present lessor of the plaintiff, to whom the lot had been devised by Colonel Fraser, entered upon the land to make enquiries from the defendant about her payments, which were then due, with the intention, no doubt, of asserting her right to the possession, if some satisfactory arrangement could not be made. result of this interview was, that the plaintiff allowed the defendant to continue in possession upon her promise of future payments. Now the tenancy at will, which had been dissolved by the death of Colonel Fraser, was by this act revived. And as twenty years have not elapsed since the creation of this tenancy, which must have been somewhere about the year 1834, the lessor of the plaintiff's title, as derived through the will of the father, must be upheld.-10 M. & W. 572; 7 Jur. 532; 9 Bing. 386; 4 M. & W. 42, 4 M. & G. 30; 7 M. & W. 226; 9 M. & W. 643; 5 Q. B. R. 767.

ROBINSON, C. J.—If it were necessary to resort to the letter put in on the argument, as furnishing a written admission of title sufficient under the statute, the first question would be, whether it is in its contents a sufficient admission of title, and I should think it is, without doubt, sufficient.

All that is necessary is, that we should be able to gather from the paper that the person signing it admits that he holds by sufferance of the other, who has the title, and does not claim to be the owner himself. This paper imports that distinctly enough for the purpose.

The next question would be, whether being signed, not by this defendant but by her son, it could be of any avail as an admission under the statute; and this, we think, we need not discuss, for if no such letter

had been written, it is clear that the lessor of the plaintiff is not barred by the Statute of Limitations.

It does not appear in proof when Col Thomas Fraser died; but it is clear that while he lived this defendant was tenant at will to him, being a purchaser let into possession on condition that on making certain payments she was to receive a title; unless indeed she fulfilled her agreement, she would have no right to continue in possession; but taking it most in her favour and that she continued to hold at will, then when Col. Fraser died that relation was dissolved, and being at an end long before our tatute 4 Will. IV., ch. 1, was passed, the time which elapsed under such circumstances is not to be taken into account as part of the twenty years necessary to make a title by possession.

Then the next we hear is, that Archibald Stewart, the son of the defendant, made some bargain with the husband of the lessor of the plaintiff, to whom Col. Fraser had demised the land, and having failed in his payments a suit was brought to dispossess him, which was discontinued at his request in 18-4, on his writing the letter of which I have spoken; and about that time, or rather after it, as conclude from the evidence, the lessor of the plaintiff went on the land as owner, to ascertain what the defendant or her son intended to do, and being satisfied with the promises of payment which she held out consented to her remaining for the present. That was then the commencement of a new tenancy at will between the defendant and the lessor of the plaintiff, since which twenty years have not elapsed, and it was in that situation the parties were when the statute 4 Will. IV. was passed. It is clear that twenty years have not elapsed since the creation of that tenancy, and therefore the title of the true owner is not extinguished.

We must look upon her after this interview as holding, not under Archibald, (if that would make any material difference in the computation) and so continuing his possession, but as holding under an express understanding with the lessor of the plaintiff, who had entered on the estate, as we may suppose, for the purpose of determining her will or asserting her ownership and gaining possession.

The action of ejectment is unimportant. It would show only a determination on the part of the owner to get into possession of the property, and that the defendant was regarded as a trespasser; so that unless possession should be regained within twenty years after that, the title would be extinguished.

If it puts an end to any former tenancy at will, it certainly cannot have the effect of creating any new tenancy; and in the case of Doe Dem. Ausman v. Minthorne in this court, which was referred to in the argument, if it could even have had that effect, still there would have been a possession after that, long enough to extinguish the title; but in that case it was the notice to quit which had been given, that was relied on as an acknowledgement of a then existing tenancy, and also the judgment afterwards obtained in ejectment, but not acted upon, either of which the court held could avail to defeat the effect of the statute, for reasons which were given in the judgment.

This case appears to us to be free from doubt, and certainly the verdict is fully in accordance with justice, since the lessor of the plaintiff should either have the land or the money that was agreed to be paid for it.

I should regret to find that the title was extinguished by possession, in a case where the injustice would be so palpable, but that may be the effect in such cases if due caution is not used.

MACAULAY, J.—The deed from Losee to Thomas Fraser, deceased in 1799, preceded the government grant to Losee, but Fraser in his lifetime sold to defendant, and she held under him in 1817, thereby recognizing his title - apparently giving promissory notes for the purchase money, and receiving a bond for a deed on payment thereof.

Fraser devised the lot to the lessor of the plaintiff, and defendant paid portions of the purchase money to Fraser in his lifetime, and to the lessor of the plaintiff for her husband after his death.

Regarded as a tenant at will to Fraser, such tenancy ceased at his death; but the payment by her, and acceptance by plaintiff's lessor of purchase money after his death, amounted to an implied ratification of the contract, and was sufficient to create anew the relation of tenancy at will, or the privity or relation that exists between a vendor and vendee or the devisee of the vendor and the vendee, under such a sale and purchase as this was. This relation amounted to a tenancy at will, so far, that the plaintiff's lessor could not afterwards have ejected defendant without a previous request of possession.

Now such tenancy was ended in 1830 or 1831, when the plaintiff's lessor brought ejectment against Archibald Stuart, as tenant in possession, thereby treating him as a trespasser, a proceeding inconsistent with a concurrent assent to defendant's being in possession as a tenant, or otherwise, under the continued sanction of plaintiff's lessor.

Under such circumstances a right of entry accrued at that time, as against defendant, and this was before the statute 4 Will. IV. chap. I. That ejectment suit was abandoned, but the present action is within twenty years of that period.

I do not see that defendant was in a situation to have been treated as a trespasser, at a period more than twenty years ago, i.e., after the lessor of the plaintiff accepted a payment on account of the balance of the purchase money, and before the ejectment in 1830 or 1831; and if the tenancy subsisting by reason thereof was (as it seems to have been) put an end to by the adverse proceeding in ejectment against defendant's son Archibald, before the act of 4 Will. IV., ch. 1, such act would not retrospectively operate to put an end to such tenancy at an earlier period, according to Doe dem. Evans v. Page, 5 Q. B. 767; 8 Jur. 399, S. C.; and consequently the present action having been instituted within twenty years after the right to enter accrued, the plaintiff is entitled to recover.

—9 Jur. 413; 14 M. & W. 39; 11 Jur. 286; 7 M. & W. 226-33; 9 M. & W. 643.

The case of Doe Goody v. Carter, 11 Jur. 286, seems directly against Doe Evans v. Page, in the same court, but I am disposed to follow the former, which does not seem to have been cited in the latter case; and it appears to me to be more in accordance with the language, though perhaps not within the intention of the statute 4 Will. IV., ch. 1, sec. 19, which says, that when any person shall be in possession of any land as tenant at will, the right of the persons entitled shall be deemed to have accrued at the determination of such tenancy, or at the expiration of

a year next after the commencement thereof, at which time such tenancy shall be deemed to have determined.

This clause seems to relate strictly to tenancies at will subsisting at the passing thereof, by force of the words shall be in possession, not shall have been. When the possession was merely at sufferance or adverse, the statute seems to have left it under the general provisions of the previous clause, sec. 16.

JONES, J., and McLEAN, J., concurred.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

? Per Cur.—Postea to the lessor of the plaintiff.

BEARD, ADMINISTRATOR, V. KETCHUM.

Upon the issue of ne unques administrator, the plaintiff—producing such letters of administration as he has pleaded—will be entitled to succeed. If the letters of administration do not give the plaintiff a right to sue by reason of anything extrinsic, such as the place of residence of the defendant, &c.—the extrinsic fact must be pleaded specially.

Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator.

The plaintiff as administrator sues the defendant upon four notes made in 1796, averring administration de bonis non, in 1847, and laying promises to himself as administrator. The defendant pleads that he did not promise in manner and form, &c. Upon the trial it was proved by a witness, not shewn to have been the plaintiff sagent, or in any way privy to the cause of action, that he came from the United States in 1842, to speak to the defendant about these notes; that the defendant then said to him, "get me the large note yot, speak of and shew that to me, and I will pay the whole;" that he brought him this note when he came the second time in 1844, and after much discussion the conversation ended in the defendant saying, that he (the witness) must see a third party, to whom this defendant referred, intinating that he would not engage to pay until something had been ascertained through this reference; that he (the witness) made the reference to this third party; that nothing resulted from the interview, and that an action was thereupon brought. Held, per Cur, upon these facts—Jones, J., dissentiente—that if the admissions to the witness could be construed into an absolute promise to pay—still being made before the plaintiff had received his letters of administration, they could not support the issue raised.

Quære. Do the admissions in evidence support an absolute promise to pay—supposing them to have been made to the administrator himself? And if they do—does the fact of their being made to this witness instead of to the administrator make any difference?

Assumpsit by plaintiff as administrator, with the will annexed of Ozias Marvin, deceased, de bonis non, left unadministered by Stephen Lockwood deceased, who was executor of the said Marvin.

The declaration contained four counts upon four promissory notes, averred to have been made by defendant in the years 1796 and 1797, and two counts for goods sold and delivered, and on an account stated.

The promise in these six counts was laid to the testator; and at the conclusion the plaintiff averred, that after death of Marvin and of Lockwood, viz., 23rd of January, 1847, administration de bonis non, with the will annexed, was granted by the Court of Probate of Upper Canada to plaintiff.

The plaintiff then added four counts on the same four promissory notes, laying promises to the plaintiff as administrator, with a count for

interest and a count on an account stated with plaintiff, concluding with a breach in not "paying any of the said monies," to the plaintiff's damage as administrator of 700l.

The plaintiff made profert of the letters of administration granted in this province.

Pleas, 1. That the plaintiff never was administrator of Marvin, deceased, in manner and form, &c.

- 2. To first, second, third and fourth counts, that Marvin died in foreign parts, viz., in the State of New York; and that at the time of his death the notes declared on in those counts were out of the jurisdiction of the Court of Probate of this province, viz., in New York, &c.
- _3. That he did not make the notes in those counts mentioned, or either of them.
- 4. To the first, third, fourth, fifth, sixth and seventh counts, the Statute of Limitations.
- 5. As to all the counts after the fourth, that he did not promise in manner and form as the plaintiff has above thereof complained against him.
 - 6. To the first seven counts, payment to Marvin in his lifetime.

The question whether the verdict could be maintained, applies to the eighth, ninth, tenth and eleventh counts, which state the several notes as inducement, and lay a promise by defendant to pay the plaintiff as administrator.

Plaintiff replied, joining issue on first plea, demurred to the second plea, joined issue on the third plea, replied to fourth plea the foreign residence of Marvin till his death, and of plaintiff since his death until within six years, and joined issue on the fifth and sixth pleas.

Defendant demurred to plaintiff's replication to the fourth plea.

Letters of administration were put in under the seal of the Court of Probate of Upper Canada, dated the 23rd of January, 1847, to plaintiff, with will annexed as pleaded. A grandson of the testator proved that he came to this province in 1842, and in 1844 and 1846, to request payment from the defendant, that he exhibited the notes to him, and that defendant admitted his signature and promised to pay the whole demand.

It was objected, 1st. That it was necessary to prove that administration had been committed to Lockwood as executor, otherwise plaintiff did not prove his declaration that he was administrator, in manner and form, &c., that is, de bonis non; this was overruled.

2ndly. That the counts on a promise to plaintiff as administrator, were not sustained, for that he was not administrator till after the alleged promise was made to him.

3rdly. That the Court of Probate in Connecticut could not grant administration of assets in New York, and their administration, therefore, was void, as regarded these notes.

Leave was given to defendant's counsel to move on any objection apparent on the judge's notes; and the jury gave a verdict for 447l. 10s., being the amount of notes and interest, or rather the balance due on them, some payments having been made on account not long after their date.

Cameron, Sol. Gen., obtained a rule to enter a nonsuit on the points reserved, or that a verdict be entered for the defendant on the last set of

counts in the declaration, which laid a promise to the plaintiff as administrator. He mainly relied upon the second objection taken at the trial, and cited 8 A. & E. 624; 1 Y. & J. 380.

Sullivan, Q.C., and Bell shewed cause; they cited 1 Y. & J. 21; 1 Jur. 101; 1 B. & C. 150; 8 A. & E. 624; 12 M. & W. 224; 6 Jur. 620; 1 Haggard, 382; 2 Madd. 101; Wms. Ex. 658; 5 B. & C.—; 3 T. R. 125; Jur. 2, Oct. last, 785; 1 M. & G. 159; 1 D. & R. 35.

The arguments of counsel fully appear in the judgment of the Chief Justice.

ROBINSON, C. J.—The first question that arises is, as to the plaintiff's right to a verdict in his favour upon the first plea of ne unques administrator, and on this, I am of opinion that he was entitled to succeed. He produced letters of administration such as he had pleaded; and if either those letters of administration did not give him a right to sue upon those notes by reason of anything extrinsic, such as the place of residence of the maker at the time of administration being granted; or if by reason of the notes themselves being in New York at that time, which was not proved, so far as I can discover on the evidence, the consequence would follow, which I do not admit, that the administration granted would not extend to these simple contract debts, yet such facts must be pleaded specially.

The case of Stokes, Administrator, v. Bate, cited by Mr. Bell in the argument, supports that position.

It was not attempted to be shewn here, that the intestate had bona notabilia in several districts in this province, and if he had, as the administration was granted by the Court of Probate, it would have been no objection.

It is also clear, that the plaintiff was not bound to produce the administration granted to Lockwood. He shewed that he had obtained such an administration as he set out, and that is all that the plea denies.

The only point in the case is, whether upon the plea denying any promise made to the plaintiff in respect to the last seven counts, the plaintiff proved the issue in his favour. Did he shew a promise by defendant to him as administrator? It is objected that he did not, for—

1st. The promise was not to him, but to a stranger. And 2ndly. If he could under other circumstances avail himself of a promise or admission made to a third party, yet that he could not here, because he was not in fact administrator at the time, and so the promise could not by any intent have been made to him as administrator.

Does this case of a promise made to a stranger before administration granted, come within the principle of Foster, Administrator of Pollard v. Bates, 12 M. & W. ?24; and Thorpe v. Stallwood, C. P. 12 Law Jour. N. S. 241?—3 Dowl. N. S. 24. These and many previous decisions establish, that administration relates back to the death of the intestate, so as to enable him to sue for torts committed, or on contracts made in the intervening period.

That a promise to pay, for an acknowledgment made to a third party, is sufficient to take a case out of the Statute of Limitations, was decided in Mountstephen v. Brooke, 3 B. & Ad. 141. Yet in Grenfell v. Girdlestone, 2 Y. & C. 662, Baron Alderson treats it as a point very clear, that an acknowledgment to a stranger will not now suffice to take a debt out of the statute. "Lord Tenterden's Act," he says, "explains

that." Now I confess that I do not see what there is in Lord Tenterden's Act, 9 Geo. IV., ch. 14, that can have made any difference in the law at that point. And in Clark, Administrator, v. Hooper et al., 10 Bing. 480, which was long after that statute, the court do not appear to have been under the impression that the statute had any such effect. The plaintiff there relied on a payment of interest made within six years by the defendant, on a note sued upon, but made to an administrator who had not taken out administration in the proper diocese, and was therefore not entitled to recover. It was objected that such payment could not take the case out of the statute; but Tindal, C. J., said, "in the mind of the "party paying, such a payment must have been a strict acknowledgment "and admission of the debt, and is the same thing in effect as if he had "written in a letter to a third person, that he still owed the sum in "question; the objection, therefore, falls to the ground." Park and Gaselee, Judges, concurred. Alderson, J., observed, "this is an acknow-"ledgment that the debt exists, and if the debt exists, the law raises the "promise to pay."

I do not see clearly how this case, or rather this report of the language used in this judgment, is to be reconciled with the judgment of the Court of Exchequer, in Timmins et al., Executors, v. Platt, in which Baron Alderson also concurred.

But in reality, the case before us has no relation to the Statute of Limitations, for that is not involved in the pleadings relating to the last set of counts.

The plaintiff sues as upon a promise recently made by the defendant to the plaintiff as administrator. The defendant denies that he made any such promise, and the question is, whether the plaintiff has sustained the issue. Has he shewn that the defendant promised to pay the notes to him as administrator?

If the cases on the Statute of Limitations have any application, it can only be indirectly, as authorities to shew from what descriptions of acknowledgment a promise to pay may be implied, and what can be fairly called a promise to pay when it is alleged to be express. The same reasoning, it may be supposed, will apply in this case as in those.

It is a singular case, and perhaps almost unprecedented, of a demand on a simple contract, sued for fifty years and more after it was due; but I know of no authority which would warrant a distinction between such a debt and any others barred by the statute, though not so old. On that point I refer to Dubelloix v. Lord Waterpark, 1 D. & R. 17.

The maker of the notes may be supposed quite capable of knowing whether he ever did in fact pay his debt or not, and one may assume that if he were not quite clear, he would have less scruple in declining to acknowledge so extremely stale a demand. If he has clearly acknowledged it and promises to pay, we cannot, as I assume, allow such acknowledgment or promise to have less operation than if made in respect of a debt eight or ten years old.

Then putting all consideration of time out of the question, the questions are: 1. Did the plaintiff shew at the trial what ought to be deemed a promise to pay, supposing that all that his witness proved had passed between the plaintiff himself and the defendant? 2. If he did, then will the promise (such as had been proved) less avail him, on account of its

being made, not to himself as administrator, but to a third party not shewn to be his agent or to have any privity with the cause of action, and at a time when this plaintiff had not yet administered to the estate, by which I mean that he had not received letters of administration in this province, which could alone enable him to represent the estate here.

Upon the first point I have some doubt. The courts of late years, ever since the case in Tanner v. Smart, 6 B. & C. 603, in the King's Bench, which preceded the passing of Lord Tenterden's Act, have been rigid in regard to the proof of acknowledgments and promises, to take a case out of the statute. They will not infer a promise from a mere admission of the debt, unless that admission is plain and unqualified, and they will not construe that into a promise absolutely binding, which has been only a conditional or qualified promise.—14 M. & W. 741.

When the witness first came from the United States to speak to the defendant about this debt, he declares that the defendant then said to him, "get me the large note you speak of, and shew that to me, and I will "pay the whole." The witness then says, that he brought him this note when he came the second time, and after much discussion the conversation ended in the defendant saying to him, that he, the witness, must see a third party, to whom the defendant referred, and have a communication with him, intimating that he would not engage to pay until something had been ascertained in consequence of this reference. And the witness adds, that he did refer to the third party mentioned, and that nothing satisfactory resulted from the interview, and this action was in consequence brought.

It may be urged, that the promise which the defendant then made in the first conversation could not be retracted, and that therefore, whether he had or had not made such disposition of his property since 1797, as disabled him from paying this long outstanding debt, still he must be held to that promise, and not have leave in any degree to withdraw from it.

That would seem quite just and reasonable as the result of an interview between the plaintiff or his agent and the defendant, if the conversation had not been continued, but when it was continued, and ended at last in an understanding, that the witness was to go to Toronto and see the Bishop of Toronto on the subject and communicate the result, I have difficulty in saying, that so far as regarded any promise to pay, the matter should not be considered as standing open, or else to what purpose should the one propose the reference and the other assent to it.

But when neither of the conversations was with the plaintiff himself, but with a third party not being administrator of the creditor, I have more doubt whether we can properly look upon it as so rigidly binding, when made to a person not then authorized to receive it, as that the defendant could not in any manner withdraw or qualify it, or make its performance depend upon any condition or any fact to be ascertained. In such a case the language of the court in Ward and Wife v. Hunter, 6 Taunt. 210, would seem to apply with force; that the promise (to have an effect absolute and irrevocable) must be made by a person competent to make it, "and to a person who is in existence to receive it." If the witness cannot properly be recognized as representing the plaintiff in this suit, who had not then administered in our courts, then he would seem to stand in no other situation than any third party having no privity

with the suit or the subject of it; and I think we could not properly hold, that because A., in a conversation with any third party, admits that he owes B. a debt, and says he will pay it, he has bound himself by such a declaration as irrevocably as if he has promised to pay to the party himself.

I observe that Mr. Starkie, in his Treatise on Evidence, expresses (in a note) an opinion, that it would seem inconsistent with the principles established in Tanner v. Smart, to hold that an acknowledgment made to a third party can take the case out of the statute. I can understand the ground on which this is said, but am not prepared fully to assent to it. The evidence in this case is of more than an acknowledgment; there is evidence of a promise; but taking it altogether, I do not consider it such as should have been accepted as satisfactory, without an explanation more particular than was given of the object of the reference that was made to the Bishop of Toronto, and of the nature and result of the communication that took place.

The evidence on that point would perhaps have been more particular, if it had not seemed to the learned judge at the trial, that the plaintiff's case must fail on another point, which I will next consider, namely, whether a promise made to the witness who proved it can be treated as a promise made to this plaintiff, who had not then taken out administration in this province.

The learned judge held it could not be. The plaintiff's counsel contends, that it is a legal, binding promise, upon the principle, that the administration when granted relates back, and gives the administrator rights retrospectively. No doubt to some purposes it does; and if I could see that it did, for the purpose of making a promise to a stranger, before administration was granted, a promise to him by relation, so as in effect to take a case out of the Statute of Limitations, then I should be of opinion that we ought to grant a new trial on the other grounds, either on payment of costs, or with costs to abide the event; in order that the terms of the defendant's last understanding with the witness, which I look upon as that which ought to be considered final and binding (if any were), should be exactly ascertained.

For I think it should be a clear case in point of law and evidence, that should enable a plaintiff to recover in this province a note of hand with fifty years interest upon it, which had been made by this defendant jointly with another person, and on which judgment had been obtained against both in a foreign court nearly as many years ago.

If the ruling upon the legal points at the trial was right, then the defendant is entitled to a verdict or nonsuit on the leave reserved.

The Solicitor-General relied upon Suwerkrop v. Day, 8 A. & E. 629, which is at first sight an authority in defendant's favour; but it is not conclusive when carefully examined. The Statute of Limitations is not here pleaded, and could not be, or rather need not be, in regard to any promise alleged to have been made to the admistrator, because if any such were made it was recent.

The defendant was clearly at one time indebted to the testator, Marvin, and there was the express promise from him to Marvin to pay the notes sued on. That promise, or rather the cause of action grounded upon it, the plaintiff now represents; but the statute began to run in

respect to it from the time the note became due, and so the plaintiff would be barred by the statute, unless he can shew another promise to have been made within six years. If he can, then the statute is in fact defeated though not pleaded, and therefore there can be no question that the same evidence of a promise must be given when it is sued upon in the declaration with that view, as if a promise were replied to a plea setting up the statute.

Then the case of Foster, Administrator, v. Bates, 12 M. & W. 226, is relied upon as supporting the plaintiff's case. That case goes the length of determining, that as the letters of administration have relation back, so as to give the administrator, in contemplation of law, a property in the goods and effects of the estate from the death of the intestate, and consequently a right (as has been determined) to bring trespass or trover for injury done to them, or for a conversion of his goods, before letters of administration were granted; so the administrator may also, by virtue of that same principle of relation, sue in assumpsit for goods of the estate sold by a third party, as agent of the estate before the administration was committed to him. We are, therefore, to take it as clear, that so far as may be necessary for vindicating the interest of the estate in the goods, either by suing for damage done to them, or recovering their value if converted tortiously, or compensation for them if sold to a stranger, the administrator may be looked upon as if he had represented the estate from the first.

This principle of relation is said to have been established and recognized from the necessity of the thing, for otherwise, in the interval between the death and the grant of administration, the estate might be ruined without possibility of redress. Then the question is, as the principle of relation, thus founded in necessity, exists in the cases I have mentioned, but does not prevail for all purposes, can we hold that it prevails for the purpose of facilitating the recovery of a debt barred by the Statute of Limitations!

There is much room for argument on both sides. In some cases, where the six years were nearly expired at the time of the death of the creditor, it would seem hard if an admission made to the agent of the estate, who afterwards administered perhaps himself, should not avail; but I do not feel that we are warranted in extending the effect of the adjudged cases that length.

The issue here is, did the defendant promise this plaintiff as administrator to pay him the notes sued upon? The truth of it is, that he promised A. B. (not this plaintiff) that he would pay the debt, and that at a time when this plaintiff was not administrator. If the promise to a stranger would enure to the plaintiff as administrator at all, can it do so though at the time of the promise this plaintiff was not administrator?

In Foster v. Bates, 12 M. & W. 226, the goods were sold before administration granted, but the goods must be looked upon as being the administrator's goods from the time of the death, then if so, they were the administrator's goods that were sold, and that being so (as we must regard it) it cannot but follow, that when the administrator's goods were sold, the promise of the vendee to pay for them to him as the legal owner was implied by law on the instant. The consequence is inevitable.

And so with respect to conversion of the goods or destruction of them,

if the administration relates back so as to constitute him the owner from the first, then it is *his* goods (as administrator) that have been converted and destroyed at the time of the wrong done. We cannot admit by any fiction the right of property to exist, and in the same breath deny the ordinary legal consequences of that right of property.

But when we are enquiring whether a debt which has been barred by time has or has not been revived by an actual binding promise, I do not see what can relieve us from the necessity of seeing that a promise was made, which at the time of its being made was good and binding. Can it be reasonably said, that the administrator represents by relation promises made to a stranger before he had any connection with the estate?

Before I could determine that, I should require to see some authorities to that effect, especially in a case in which the demand is so old as in this case, when the defendant has been proved to have been part of the time insane, and judgment obtained against him and another person jointly liable so long past, that if the judgment were in one of our own courts it would be presumed to have been satisfied thirty years ago, and without any other explanation being given in regard to that judgment as respects the other defendant.

I have still doubts upon this point, of relation back of the administration for such a purpose. I think, in such a case, it is the defendant and not the plaintiff who should have the benefit of any doubt, for he ought not to be held liable as upon a promise that would in effect deprive him of the benefit of the limitation of time in regard to so stale a demand, unless he is clearly so in our opinion.

We have found it necessary to give a great deal of consideration to this case, and have arrived, though not without hesitation, at the conclusion, that the motion for nonsuit at the trial was entitled to prevail; for that the promise proved to have been made to the witness does not support the plaintiff's replication, not having been made to the plaintiff at all as alleged, and not being made to any person at a time when it could enure to the plaintiff as administrator, because he was not then administrator, and so could not by implication be considered as being made to him in that capacity.

We therefore make absolute the rule for non-suit, but give leave to the plaintiff to have a new trial on payment of costs, if he should desire it, in order that the plaintiff may have an opportunity of giving fuller evidence on the points adverted to, as seeming to require fuller explanation.

If such new trial shall take place, then, when all the facts have been precisely ascertained, the court may re-consider the legal question of relation back of the administration, which we are willing to have re-argued and further considered.

MACAULAY, J.—In the case of Ward v. Hunter, 6 Taunt. 210, it was decided, that a statement made by the defendant to the executor of his creditor, that the testator always promised not to press him for the debt, was not sufficient evidence to take the case out of the Statute of Limitations as to counts laying the promises to the testator only, though it would have been sufficient for that purpose had the testator been living at the time, or had there been a count averring a promise to the executor as such. The ground was, that the acknowledgment or statement could

only operate by relation; and per Curiam, when the courts determine that an acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it. See also Pittam v. Forrester et al, 1 B. & C. 251.

Murray v. E. I. Comp. 5 B. & Al. 213-4; that when bills of exchange become due after the death of the holder, the Statute of Limitations begins to run from the time of granting letters of administration, and not from the time the bills become due—there is no cause of action until there is a party capable of suing.—Wooley v. Clark, 5 B. & A. 744; Hickman et al. v. Walker, Willes, 27; 4 Bing. 686; and 1 M. & P. 663; 2 Vernon, 694; 10 Ves. 93; Thorpe v. Stallwood, 5 M. & G. 760; Foster v. Bates, 12 M. & W. 226.

Though an acknowledgment to a stranger has been held sufficient.—3 B. & A. 141-2; 2 B. & C. 149; 9 D. & R. 40.

The Statute of Limitations is not pleaded to the counts in question; and cases in relation thereto are only material by analogy, as shewing under what circumstances a promise or acknowledgment will be deemed effectual.

It seems well established, that if in assumpsit the Statute of Limitations is not running at the time of the death of the intestate, it will not begin to run until the grant of administration, though more than six years after the cause of action would have accrued to the testator if living.—5 B. & A. 204; Murray v. E. I. Comp. ib. 213, S.C.; on the ground that it could not be said a cause of action existed, unless there be also a person in existence capable of suing.

8 B. & C. 285; Pratt, Administrator, v. Swaine, same points in trover, ib. 287; Bayley, J., says, no right of action accrues to the administrator until he has sued out the letters of administration. 2 M. & R. 350, S.C.; and that the doctrine of relation is not universal for all purposes.—See 1 Stra. 97; Gilbert's Eq. Rep. 223; Fort. 360; 8 E. 405; 1 Wms. Ex. 396, 1154.

Now here, if the notes were not due at the death of the testator the above cases would apply, but if they were due at that time they were primâ facie outlawed from mere lapse of time long before any cause of action vested in the plaintiff; and as no cause of action primâ facie was vested in him when the defendant promised to pay, to what is it to apply? How could it revive a cause of action, or waive the Statute of Limitations in relation to a cause of action, which no person then in existence was capable of suing upon? And if not, how can it be treated as a promise to pay the plaintiff as administrator?

In Foster v. Bates, there was an implied promise to pay the owner of the goods—the consideration continued and subsisted until and at the grant of administration to the plaintiff; an implied promise arose thereupon, and he could sue thereon, but the Statute of Limitations did not begin to run till then. Had the goods been sold and delivered by the intestate, I am disposed to think no acknowledgment or promise made after his death and before administration could avail, because the plaintiff would be obliged, in that event, to allege a promise to himself as administrator, which would not be proved by shewing a promise or acknowledgment when no one was in esse to receive it.

It is said in 2 M. & W. 721-2, the right of action is transferred, and that the cause of action is the existence of the note with the express promise to the executors to pay the amount. How could a right of action be transferred, or a cause of action accrue, if there was no administrator at the time when the promise was made?

If there can be no implied promise to pay a person not in esse (as an administrator) by relation, I do not see how there can be an express one. No case is shewn in which such a promise has been treated as sufficient.—See Cary v. Stephenson, 2 Sal. 421; Carth. 335; Skin. 555; 4 Mod. 372; Cro. Jac. 51; 2 Saund. 63, (f) (n).

Upon the death of the testator there was no implied promise to pay the administrator, and if there was, it would only arise when he became administrator; if so, how can there be an express promise at an earlier period than an implied one would have arisen?

Even when a promise is implied to the administrator (as upon a cause of action complete after the death of the intestate), it relates only to the time of administration had, although the debt existed for ten years before. On the same principle, how can an express promise made before administration, and which does not, like the consideration raising an implied one, continue—have a prospective relation any more than the other a retrospective one?

In the case of Clarke v. Hougham, 2 B. & C. 149, it does not appear whether the declaration contained counts with promises to plaintiff as administratrix, and if so, whether she was administratrix when the defendant promised another tenant to rectify the mistaken payments, if any.

If it was before administration granted, this case would be in point for the plaintiff.—See S. C. 3 D. & R. 322. There must have been a promise laid to plaintiff as administratrix, and she must have been administratrix when defendant promised, i. e., in 1820.

The promissory notes in one light may be regarded as chattels, and as choses in action. If wrongfully converted before administration, the administrator could recover therefor in trover, according to the latest decisions on this head; the property therein being deemed to have vested in him by relation from the death of the testator. But regarded as choses in action, no right of action thereon was transferred to or accrued to him till the grant of administration. The right of action was transferred as it existed at the death of the intestate, subject to the Statute of Limitations if then running; but as said by Parke, Baron, in 2 M. & W. 721-2, "the cause of action, as alleged in the counts before us, is the existence of the notes, with the express promise of the defendant to pay the amount." A subsequent admission, or promise in relation to the right of action, could not operate to sustain the alleged cause of action being made at a period when no one existed in whom the right of action was vested, or who was entitled to sue thereon. It may, however, be hereafter held otherwise in England; it is a doubtful point; but I can find no authority or decision for holding the present a valid and binding promise in favour of the plaintiff under letters of administration subsequently granted; and in the absence of authority, it seems to me the safest application of the authorities taken altogether, not to give effect to the promise in evidence by construction and relation.

Upon the whole, therefore, the most satisfactory opinion I can form is

that the promise in evidence does not support the issue in the plaintiff's favour. At all events there should be a new trial, that it may be distinctly found whether the defendant did absolutely and unequivocally acknowledge his liability, and promise to pay the debt—7 T. & R. 182; Hurst, Admor, de bonis nou, v. Smith, J. B. & C. 150.

JONES, J.—The declaration consists of thirteen counts, the first four upon four promissory notes and *in indebitatus assumpsit*, with promises to the testator; of the six others, four are upon four promissory notes, the fifth for interest, and the sixth npon an account stated, with promises to the plaintiff as administrator.

The first seven counts being abandoned, the only question is as to the remainder,

To these the defendant has pleaded: 1. That the plaintiff is not administrator of Ozias Marvin, the testator. 2. Non-assumpsit.—The Statute of Limitations not being pleaded to these counts, the statute is out of the question.

Upon these issues, the plaintiff was required to prove his claim against the testator as alleged in the counts, and an express promise to pay the plaintiff as administrator, which is alleged in the declaration.

A witness, having in his possession the notes in question, in 1842, 1844 and 1846, called upon the defendant for payment; he admitted the notes and amount claimed, and promised to pay them. Was not this an express promise to pay if the agent had been the administrator? And it was not contended in argument, that on the first interview only, three of the notes were produced; defendant said they were right, and if the fourth, for four hundred dollars, was produced, he would pay them all. On the second interview the four-hundred-dollar note was shewn to him, and he said that was the note and it was all right.

How the notes came into the possession of the witness, or by what authority he demanded payment, did not appear; and at the several times mentioned by the witness the plaintiff was not administrator in this province.

The letters of administration to the plaintiff, with the will of Ozias Marvin annexed, were not granted until January, 1847.

The only question that arises is, whether this promise made to a stranger was to be regarded in law as a promise to the administrator, who subsequently obtained letters of administration.

In order to take a case out of the Statute of Limitations by a promise to pay within six years, it must be an express promise to pay, or an acknowledgment of the debt from which the law implies a promise. In Mountstephen et al. v. Brooke et al., 3 B. & Ald. 141, it was held, that an acknowledgment by the defendant of the existence of a debt due to the plaintiffs, in a deed between the defendant and a third person, the plaintiffs being wholly strangers to the deed—was sufficient to take the case out of the Statute of Limitations.—2 B. & Ad. 149; 3 Campb. 32.

The promise to pay, or the acknowledgment that a debt is due the estate of an intestate, although before administration granted, should have relation back to the time letters were granted. And I think the decision in the case of Foster, Administrator, v. Bates et al., 12 M. & W. 226, establishes, that the promise in this case to a stranger will support the promise laid to the administrator. There the sale of goods of an intestate by his agent after his death, for the benefit of the estate and before

administration, gave the administrator a right to sue. It was held that the title of administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to entitle the administrator to sue in assumpsit of goods sold and delivered; and that as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection, that the intended principal was unknown at the time to the person who intended to act as the agent of the estate. The language of Parke, Baron, in giving the judgment of the court, is strong to shew the plaintiff's right to recover in this action upon the evidence.

The letters of administration produced, reciting the probate to the executor, are sufficient to establish the plaintiff's right to sue, as long as they remain unrepealed, without the production of the probate.—Catherwood et al., Administrator de bonis non of J. Catherwood v. Chabaud, 1 B. & C. 150; 5 B. & C. 491.

I think the postea should go to the plaintiff. The debt is a very stale one, and the amount of interest very large. I should have been better satisfied with the verdict without including the interest; but still the jury had a right to find the interest as well as the principal, the notes being expressed to be payable with interest.

McLean, J.—The declaration contains two sets of counts, the first on the several notes and demands, alleging a promise to the testator, and the second on the same causes of action, stating a promise to the plaintiff as administrator since the death of testator, and breach. To the first set of counts the Statute of Limitations has been pleaded, but not to the last.

Leave was reserved to the defendant at the trial, to move against the verdict, on any objection appearing on the judge's notes; and the defendant has moved to set aside the verdict and enter a nonsuit, or to enter a verdict for the defendant, on certain issues on the last seven counts.

It was not shewn that from the year 1830, when Lockwood, the executor in the United States, died, up to January, 1847, there was any person either in the United States or in this province acting for and representing the estate of Ozias Marvin, nor was it shewn that any promise or acknowledgment of debt had at any time been made during the period that Lockwood acted as executor. No evidence was adduced to take the case out of the Statute of Limitations on the first set of counts, which were abandoned, and on these the defendant seems to be entitled to a verdict.

As to the promise alleged to the plaintiff as administrator, the statute is not pleaded, and the acknowledgment being within six years, on which plaintiff contends an implied promise arises, if such promise does arise, the statute could not operate. The question is, whether on the acknowledgment made to the witness Legrand Marvin, the law will raise a promise to pay an individual who at the time had no connection with the estate of Ozias Marvin, the creditor of defendant, and whose authority to act has been obtained since the making of such acknowledgments.

The letters of alministration authorize the plaintiff to collect any debts, and to administer to all the goods of the testator which were left unadministered by the executor, Lockwood; and the notes in question being a portion of the goods left unadministered, the plaintiff as administrator

has an undoubted right to sue for them, his authority not being limited to matters arising since the granting of administration.

When an executor sues on a debt due in the lifetime of his testator, the declaration must allege a promise to the testator, and then assign as a breach of that promise, that the money was not paid to the testator, or to the plaintiff or executor since his death; and when an acknowledgment or promise has been made to the executor after the death of the testator, that promise is often relied on and a breach of it alleged as the cause of action.

In the latter case, however, the production of a note or bill, which became due during the testator's lifetime, with proof of the signature, would not be sufficient to entitle the executor to a verdict, and he would have to go farther, and prove the promise or acknowledgment as stated in his declaration made to himself.

The law will not transfer the original promise from the testator to the executor, so that the latter can recover on such promise as made to himself.

—2 M. & W. 720. If the debt in this case had become due after the death of Ozias Marvin, his executor or administrator might recover on an implied promise to pay the amount to him as the representative of the estate, and entitled by law to receive it; but being due before the death, he must recover on the promise to the testator, unless there has been a promise to himself since the death, which promise he would have to prove, if relied on.

There has been no promise in this case, or any acknowledgment from which a promise can be implied, since the plaintiff has obtained administration, and unless the admissions to the witness afford ground from which such promise will arise in law, the plaintiff cannot recover.

In the case of Foster, Administrator of Pollard, v. Bates et al., 12 M. & W. 226, the plaintiff recovered for goods sold and delivered by an agent of the intestate after his death; but there the action was for goods sold and delivered by the administrator, and the court held, that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so as to entitle the administratork to sue for goods sold and delivered. The act of the agent in that case, in selling, though in ignorance of who the administrator was or would be, was regarded as the act of the administrator subsequently appointed. Under the administration the plaintiff was entitled to all the goods the intestate died possessed of, and having confirmed the sale made by the agent, he was considered entitled to recover the value. The purchaser of the goods in that case bought them as the goods of the estate, to be paid for to the person who should be entitled, and there was, therefore, an implied promise to pay the plaintiff on his obtaining letters of administration.

An implied promise will arise from an acknowledgment to a third person of the existence of a particular debt, if there is any person to whom it can be considered to have been made; but I cannot see how there can be a promise express or implied, unless made to somebody. To whom then was the implied promise made, which would arise from the admissions made by defendant to the witness in this case? Can it be said that it was made to the plaintiff, who at the time was a stranger to the estate of Ozias Martin?

In the case of Timmis et al., Executor and Executrix of Timmis, v. Platt, 2 M. & W. 720, Parke, Baron, says, "it is impossible to say that "any promise is implied by law to pay the executors; the right of action" is transferred to them, but no promise is implied by law to pay them, "otherwise the Statute of Limitations would run from the death of the "payee, not from the time of the note becoming due. There must be an "express promise to the executors to support the action; the cause of "action is the existence of the note, with the express promise to pay the

That view of the case was adopted by the other judges, and establishes, so far as the authority of that case goes, that where a promise is relied on by an executor or administrator as made to himself, and is declared on, an express promise must be proved.

I confess, if it were not for that case, that I should have considered that an acknowledgement of a debt made to an executor or administrator entitled to receive it, would raise an implied promise on which an action could be maintained to recover it.

If an express promise be necessary, there is none to the administrator in this case. If an implied promise would suffice, then from the acknowledgments of defendant no such promise could arise, because there was no one to whom in contemplation of law it could be made.

On these grounds, therefore, I am of opinion, that the rule in this case should be made absolute to enter a nonsuit.

DRAPER, J., being in the Practice Court during the argument, gave no judgment.

Per. Cur.—Rule absolute for a nonsuit.

LANE ET AL. V. JARVIS.

A new trial will not be granted because the jury find for the defendant in the absence of any direct evidence to contradict an unimpeached witness for the plaintiff. The jury are to form their judgment upon the whole facts and complexion of the case before them.

Action on common counts in assumpsit.

"executors the amount of it."

Pleas, non-assumpsit, and Statute of Limitations.

Plaintiffs replied to the second plea, plaintiffs' absence beyond seas; to which defendant demurred.

The plaintiffs are tailors resident in London, and have brought this action to recover the amount of a disputed item in an account furnished many years ago.

Their only witness was their travelling agent, who has been in the habit for many years of making periodical visits to Canada, to receive orders and to collect debts

It appears that on one of these occasions, so long ago as 1830, he was in Toronto, and solicited and received from the defendant an order for a militia uniform coat and some other articles; and in the following year, when the things came out and the account was presented, the defendant refused to receive a military cao and feather, for which six or seven pounds were charged, protesting that he had never ordered them, and did not want them. He offered to pay the residue of the account, but the agent insisted on his receiving and paying for the cap, as well as for the other

things, and would have all of the account or none. The defendant being resolved not to pay for the disputed item, and declaring himself able to prove, by a gentleman who was present when the order was given, that he had expressly declined to order a cap when the agent proposed it, an action was brought in 1832 or 1833 to compel him to pay the whole account. The defendant paid into court 26*l*. 7*s*., which covered the undisputed part of the account, and pleaded non-assumpsit to the residue.

The plaintiffs' agent took out of court the sum thus paid into court, and proceeded no further in his action, but submitted to be non-prossed, and judgment of non-pros. was regularly signed, and execution issued for the costs in 1833.

In 1847 this new action was brought for the disputed item, under the instruction of the same agent, who had been repeatedly in this province in the intervening period, carrying on suits against other parties, but making no further movement in this during a period of thirteen or fourteen years. In the meantime the gentleman, to whom the defendant referred the plaintiffs' agent, as having been present when the order in question was given, had died.

The learned judge left the case to the jury, upon the evidence given by the plaintiffs' agent, and they found for the defendant.

His charge was not complained of, but a new trial was moved for on the ground that the verdict was contrary to the evidence.

ROBINSON, C. J., delivered the judgment of the court.

We think we ought not in such a case to grant a new trial.

The account in dispute is small; the demand is stale; and when the plaintiffs knew that the defendant disclaimed the debt, they should have proceeded in a reasonable time to enforce it, instead of delaying for so long a period, that the demand would have been barred twice over by lapse of time if the foreign residence of the plaintiffs had not brought them within the exception of the statute, an exception not very reasonable to urge, when the plaintiffs have had throughout the time an agent transacting their business in Upper Canada, and for that purpose frequently visiting the province, and bringing whatever actions he found it convenient to bring—the same agent who did actually sue for this alleged debt nearly fifteen years ago, and who after this long interval has sued again.

It is true, the defendant brought no evidence to contradict that of the plaintiffs' agent. That might, from the nature of the case, have been out of his power, even if the plaintiffs had proceeded in their action promptly; but the defendant swears that he had in fact a witness, who could have proved his defence fully, and who is now dead.

No doubt, on the other hand, it is true, that juries have not an arbitrary discretion to reject or discredit evidence, when there is nothing on the facts or complexion of the case to give rise to doubt; but, on the other hand, we cannot lay it down as a rule, that a jury must in all cases believe whatever an unimpeached witness wears, so long as they have no direct evidence to the contrary.

To announce that, would be to declare, that every one is necessarily at the mercy of tradesmen or their agents, both as regards their integrity and their accuracy, unless he can be prepared, at whatever distance of time, to prove a negative, which the law contemplates as a thing generally impossible to be done at any time.

The defendant has been consistent in resisting the demand from the The jury, as we may suppose, have considered that the plaintiff's conduct has not been equally consistent, in first refusing to take a part, insisting on the whole, then accepting a part, and apparently acquiescing in that for many years as a final settlement, and then again recurring to their claim at an unreasonable distance of time, when they or their agent most probably know that the witness, on whose evidence the defendant relied for his defence, was no longer living.

If the jury inferred from the plaintiffs suffering themselves to be nonprossed, and from their long delay afterwards, that their agent had doubtshimself of the accuracy of his recollection, they took the safer course in not trusting implicitly to his evidence.

It is not to be assumed that they suspected his integrity, though we cannot certainly know that they did not; it was particularly their province to judge the credibility of the witness; and there is one point in the testimony in which the plaintiffs' agent seems not to have been consistent in his account, first swearing that the defendant only objected to receive the cap on the ground of its being charged too high, and afterwards admitting when pressed that he did deny having ordered it.

The jury not improbably came to the conclusion, that the agent had either made a mistake in this one transaction out of a great number, or that he perhaps officiously ventured against orders or without orders to send out the article, relying upon the defendant not finally rejecting it, and either forgot afterwards what the fact had been, or persisted improperly notwithstanding the objection.

In either case, if they were not satisfied of the justice of the demand they were right in rejecting it, under the unusual circumstances.

Something too might in their opinion depend upon whether such a cap, as that brought or sent out by the plaintiffs' agent, could properly form part of a militia officer's uniform in this province, because if it did not. it would seem most unlikely that the defendant should have ordered it.

In opposition to the rule, the defendant has made an affidavit explicitly contradicting the agent's account of the transaction, and declaring unequivocally that he refused positively to give any order for a cap.

This is only so far important, that it precludes any inference unfavourable to his case that might have been drawn from his silence.

It does not appear what became of the cap, which the one would not accept and the other would not take back.

We think the case, having regard to the amount in question and to the circumstances, is not one to be sent to another trial, where there is no complaint or misdirection.

Per Cur. - Rule discharged.

DOE EX DEM. MACLEM V. TURNBULL.

So long as there is no other person in possession claiming adversely to the patentee's title—the patent, and titles given under it, carry the possession by construction of law to the owner of the fee. A visible actual possession by the owner, or by those claiming through the patent, need not be proved.

A memorial, more than thirty years old, of a lost deed, is good evidence, upon its bare production, without calling or accounting for the subscribing witnesses.

Semble: that this principle extends to any written document more than thirty years old, even to letters.

After secondary evidence of the contents of a document have been received, it is too late to object that a proper search for the document itself had not been made.

Ejectment for lands in Etobicoke, not described. Land claimed, north half lot No. 16, 1st concession.

Patent to Richard Wilson the 17th of May, 1802, for lot No. 16 and other lands.

The plaintiff next attempted to prove a conveyance by Richard Wilson and wife to William Chambers. He could not produce the deed, but proved that search for such a deed had been made without success, among the papers of the lessor of the plaintiff and among those of her son.

The registrar of the County of York then produced two memorials, and swore that he had searched and had not found in the register office any deed from Richard Wilson and wife to William Chambers.

A search was also proved to have been made among the papers of parties who had purchased others of the lands embraced in the same patent.

The plaintiff having given notice to produce the deed, then put in a memorial brought into court by the deputy-registrar of the County of York, dated 9th October, 1802, of a deed from Richard Wilson and his wife to William Chambers of the premises in question. The memorial purported to be executed by the grantor.

The deputy-registrar also swore that he had searched in his office, and could not find any conveyance from William Chambers to Sarah Chambers, widow of Isaac Chambers, for this half lot; but he produced a memorial, dated the 2nd of September, 1805, of a conveyance from William Chambers to Sarah Chambers, widow of Isaac Chambers, of the premises in question, which memorial purported to be executed by the grantor.

The same searches were proved to have been made for this deed as for the other.

The plaintiff then put in a deed of bargain and sale, dated the 4th day of March, 1823, from Sarah McCallum, formerly Sarah Chambers, of the County of Stamford, (giving her no other description) to James Maclem, of fifty acres of the north-east part of No. 16.

Both of the subscribing witnesses to this deed were sworn to be dead, but their signatures were proved.

It was shewn that Sarah McCallum was "formerly Sarah Chambers," that her husband was dead before the date of this deed.

Then the will of James Maclem was proved, whereby he devised this land to his wife, the lessor of the plaintiff.

It was objected by the defendant's counsel, first, that no possession had been shewn in the lessor of the plaintiff, or in any person, since the patent issued in 1802.

Secondly, that the witnesses to the memorials ought to have been produced or accounted for, and their signatures proved.

Leave was reserved to move for a nonsuit on these objections.

It was taken as a further objection, that there was no proof of a search among the papers of Sarah MacCallum, but that objection was not taken until after the memorial had been read.

A verdict was rendered for the plaintiff.

J. C. Morrison moved for a non-suit on the leave reserved, and cited in support of the objections mentioned above, 5 A & E. 291; 4 Q. B. R. 601; 2 M. & W. 894. He also further objected, that there was no proof of a sufficient search for the deeds—no proof of a search among the papers of Sarah McCallum, in whose possession they ought to be, and where the probability is they might have been found.

Sullivan, Q. C., shewed cause. The first objection might have been fatal if there had been any evidence of a person in possession claiming adversely to the lessor of the plaintiff's title; but in the absence of this evidence, the patent and titles given under it carry the possession by con-

struction of law.

The memorials in each case, being under seal, and given by the grantors, are deeds, and being more than thirty years old, prove upon production merely, their authenticity—just as other deeds do.—3 A. & E. 63; 2 B. & Ad. 639; 4 P. & D. 193.

The learned counsel is now too late in objecting for the first time to the search made for the deeds. His objection should have been taken at the trial, before the secondary evidence was received.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the last objection, it was too late to entertain it after the secondary evidence had been received, and to give effect to it by any latitude of indulgence would be only embarrassing the judgment of the case.

Upon the other points, we are of opinion that the plaintiff was entitled to succeed.

It was unnecessary to show any one in actual, visible possession within twenty years, for the mere purpose of giving the plaintiff a right to recover, unless it had been shown that after the patent issued to Wilson there was a possession held by some one inconsistent with his title. So long as there was no other person in possession, the patent, and titles given under it, carried the possession by construction of law to the owner of the fee.

Then as to the other objection, that the bare production of the memorials would not suffice, without calling or accounting for the subscribing witnesses, the cases of The King v, The Inhabitants of Bathwick, 2 B. & Ad. 639, and of Doe. v. Benyon, 4 P. & D., 193, show that the principle of receiving in evidence documents more than thirty years old, without proof of their authenticity, is not confined to the deeds themselves, on which the party may rely in proof of his title, but extends to any written documents whatever, even to letters.

The memorials here were executed by the grantor in each case; and he certainly could not be allowed to deny the execution of a deed, which he himself caused to be recorded as evidence to the world that he had made the deed.

In a case in this court, of Doe dem. England v. Crysdale (Michaelmas Term, 1841), a memorial was received in evidence, as in this case, without further proof, and was held to be sufficient to establish the deed, on proof of the deed being lost; that is, it was held sufficient to prove what the memorial expresses—that on such a day the grantor named in it did execute a deed to the grantee, conveying to him the premises mentioned.

In Doe ex dem. Ubele v. Killner, 2 C. & P. 289, and Collins v. Maule, 8 C. & P. 502, the same evidence was received on the trial; and as to the necessity of producing or accounting to the witnesses to the memorials executed in 1802 and 1805, that would clearly not be necessary, for even where it has been shewn, that the subscribing witness was alive and accessible, it was held not to be an objection, that he was not called; and Mr. Justice Yates, in a case before him, carried the principle so far, that "for the sake of the practice," as he said, he would not allow a subscribing witness to prove an old deed, although he attended in court for the purpose.

We are of opinion that the rule for non-suit should be discharged.

Per Cur.—Rule discharged.

DOE EX DEM. GILLESPIE V. WIXON.

The estate of a traitor, concerned in the rebellion of 1837, and who accepted the benefit of the provincial statute, 1 Vic. ch. 10, is at once by such acceptance as much vested in the crown under the operation of the 33 Henry VIII. ch. 20, sec. 2, without office found, as afterwards.

Semble.—That the wife of an attainted traitor, remaining in possession of her husband's land, cannot defeat the recovery of a plaintiff in ejectment (the purchaser at sheriff's sale, in an action brought against the traitor upon a bond entered into before his attainder), by setting up, under the attainder, a title by forfeiture in the crown, which the crown had foreborne to assert.

Ejectment for lands in Brock, not described.

A verdict was taken, by consent, for the plaintiff, subject to the opinion of the court upon the two points mentioned below.

On the 6th of June, 1836, judgment was entered against Randall Wixon and one Charles Hadley, in an action of debt on a recognizance of bail, at the suit of one Sutliff.

On the 20th of November, 1845, a fi. fa. against their lands was put into the sheriff's hands on this judgment, endorsed to levy £126 4s. 6d., returnable on the 1st of Hilary Term, 1847, under which the land in question was sold to the plaintiff.

Randall Wixon was one of those who committed treason against Her Majesty during the late rebellion in Upper Canada; and being indicted for levying war against Her Majesty, he petitioned under the act, 1 Vic. ch. 10, before his arraignment, confessing his guilt, and praying for pardon, on such condition as might seem proper. It was thereupon ordered, by the lieutenant-governor and the executive council, that mercy should be extended to him, upon the condition of his being transported to Van Diemen's Land for fourteen years; and letters patent were accordingly issued on the 22nd of October, 1838, "pardoning, remitting and "releasing Randall Wixon of and from all and every punishment whatso-"ever, which may or might be inflicted upon him by reason of the treason by him confessed, upon condition that he shall be transported and "remain transported to our penal colony of Van Diemen's Land, for and during the term of fourteen years, from the date of his arrival at the said "colony."

The statute, 1 Vic. ch. 10, of which the convict thus took the benefit, recites—"that there was reason to believe, that among the per-

"sons concerned in the late treasonable insurrection in Upper Canada, "there were some to whom the lenity of the government might not "improperly be extended, on account of the artifices used by desperate and unprincipled persons to seduce them from their allegiance;" and then it provides, "that upon the petition of any person charged with high treason, committed in this province, preferred before his arraignment to the lieutenant-governor, praying to be pardoned for his offence, it shall be lawful for the lieutenant-governor, with the advice and consent of the executive council, to grant, if it shall seem fit, a pardon to such person, in her majesty's name, upon such terms and conditions as may appear proper; which pardon, being granted under the great seal of this province, and reciting in substance the prayer of such petition, "shall have the same effect as an attainder of the person therein named for the crime of high treason, as far as regards the forfeiture of his estate and property, real and personal."

The questions raised were, whether, without office found, the estate of the convict Wixon was vested in the crown, so that it could not legally be sold under the judgment obtained against him before his attainder (so to call it, where the statute makes the effect the same), but upon an execution issued after his attainder?

And secondly, whether the forfeiture can be set up by this defendant, or whether the title under the conviction must not be held good against all but the Queen, her heirs and successors?

J. H. Hagarty, for the lessor of the plaintiff, referred to 33 Hen. VIII. ch. 20, sec. 2, and cited 1 Eden. Rep. —— Burgess v. Wheat; 2 N. & M. 489; Shep. T. Grant. 232.

Sullivan, Q. C., for the defendant, cited 3 Inst. 18, 19, 101; 1 Cruise Dig. sec. 71-2; 2 B. & Al. 238; 6 D. & R. 188; 3 C. 10, Doughtey's case.

ROBINSON, C. J., delivered the judgment of the court.

The 33 Hen. VIII. ch. 20, sec. 2 enacts that every attainder for high treason, by the course of the common law, shall be of the same force and effect as if it had been done by authority of parliament; "and that the "king shall be deemed and adjudged in actual and real possession of the lands, tenements, hereditaments, uses, goods, chattels, &c., of the offender so attainted, without any office or inquisition to be found of "the same."

• I take it, that under this provision, the lands of Wixon were, upon what is set forth in this case, at once vested in the crown, when he received the benefit of the pardon upon his application under the statute, and that the Queen had in them an estate in possession, and must be regarded as fully and accually possessed without office found, as she could be afterwards; and therefore, that the question in fact is no other than whether, if an office had been found, and it had been returned that this land was forfeited by reason of the attainder (so to call it), the defendant in this case could set up the title of the crown to defeat the plaintiff's recovery?

The case cited, of Doe dem. Griffith v. Evans, 2 N. & M. 489, does not seem to touch the question, because that was on an attainder not for high treason, but for felony, to which therefore the statute, 33 Hen. VIII. ch. 20, did not apply; and if it were not for the intervention of a pro-

vincial statute, which I shall presently mention, the questions would have been —

1st. Whether the recognizance of bail entered into by Wixon, before the act of treason committed, and on which the action was brought, could be regarded as constituting a lien upon his lands, so that they could be sold to satisfy the judgment obtained upon it, notwithstanding the subsequent attainder?

2nd. Whether the wife of the person attainted, continuing on the land, could set up the attainder of her husband and the title of the crown in consequence, in order to maintain herself in possesion against any one claiming by conveyance from her husband made since his attainder? and if not, then, whether she would not be equally precluded from setting it up against a purchaser under the judgment against her husband? or whether in either case it must not be left to the crown alone to advance its title under the attainder?

Or, 3rd. Whether, upon the nature of the plaintiff's title appearing, it would not have become necessary for the court to consider, independently of any objection made by the defendant, whether after Wixon's attainder, execution could go at the suit of any subject against the lands, so that under pretence of it lands could be sold as his, which must, upon his attainder, have become vested, without further proceeding, in the crown?

It was not shewn whether the ft. fa. against lands, on which the sale took place, was the first that had issued. If any writ against the lands had been delivered to the sheriff before the treason committed (which there might have been, the judgment being entered in 1836), then the land would clearly have been bound to satisfy the judgment.

For all that appeared, this was not the case; still, I am inclined at present to think, that the recovery of the plaintiff could not have been allowed to be defeated by suffering the wife of Wixon to protect herself under his attainder by setting up a title by forfeiture in the crown, which the crown had forbidden to assert.

But the provincial statute, 10 Vic. ch. 106, which was not adverted to in the argument, makes it unnecessary to consider these questions; for that act, which was assented to on the 26th of December, 1846, expressly reverses this and other attainders, "and vests again the real "and personal property of any such person, whether it be in possession "or in action, in such person, his heirs, executors, administrators or assigns in like manner to all intents and purposes in as full and ample a "manner, and with the like and no other or further effect or consequence as to the rights of third parties, as if such attainder of such person had "never taken place."

There can be no question that this statute removes any impediments to the plaintiff's recovery, which might otherwise have been occasioned by the attainder, and that the postea must therefore go to the plaintiff.

Per Cur .- Postea to plaintiff.

DOE EX. DEM. PETERSON V. CRONK.

Though the wife owns the fee—the husband may sustain ejectment on his own demise alone; but on such a demise the lessor of the plaintiff must prove his marriage.

A deed made by the heir-at-law, while a third party is in possession, claiming adversely, is void. The heir-at-law must gain the possession before he can convey.

Ejectment for Lot 2, part of Green Point, in Sophiasburg.

Patent to Lieut.-Col. Harvey, September, 1818, for this and other lands.

On 28th May, 1824, Lieut.-Col. Harvey conveyed the whole tract to Samuel Clowes, who a few years afterwards died, as it appeared intestate.

In 1830, James Clowes, a son of Samuel Clowes, but not his eldest son, sold and conveyed the premises now in question, being part of the tract derived from his father, to one Smith.

It was not sworn that Smith ever entered upon the land, nor that he conveyed to the defendant, nor that defendant holds any interest derived under or through him.

All that was proved respecting defendant's occupation was, that he had been fifteen or sixteen years in possession, using it and claiming it as his own.

The eldest son and heir of Samuel Clowes resides in the state of New York; and on the 27th of October, 1846, being in this country, he made a conveyance to his sister, Anne Peterson, wife of the lessor of the plaintiff, for a consideration expressed, of £100, of all the land purchased by his father from Col. Harvey, (600 acres) of which the premises in question in this action forms a part.

The fact of John Clowes being heir-at-law was clearly proved. The defendant relied on the point, that his being in actual possession, claiming adversely, at the time of the heir making the deed to Anne Peterson, made that deed void.

It was left to the jury to find, as a fact, whether the defendant was in adverse possession at the time of the conveyance, but they gave their verdict for the plaintiff, leave being reserved to defendant to move to enter a nousuit.

Wallbridge, of Belleville, moved to enter a nonsuit, on leave reserved.

Burrowes, of Kingston, shewed cause, and cited 1 U. C. R. 151; 2 U. C. R. 270.

Robinson, C. J., delivered the judgment of the court.

This rule should, in our opinion, be made absolute; not because the husband could not sue alone under the circumstances, or rather not because the action could not be sustained under his demise alone.

If the fee were in the wife, the husband could make a lease which would bind during coverture, and therefore ejectment could be sustained on his demise, as was the case in Gardiner v. Norman, Cro. Jac. 617. But in such case, proof of the marriage would form necessarily part of the plaintiff's evidence.

I do not see that such evidence was given, but probably that fact was understood to be conceded.

The clear ground on which the plaintiff is disabled from recovering,

is that which was mainly insisted upon at the trial, that when John Clowes made the deed to the lessor of the plaintiff's wife, this defendant was in actual occupation of the premises, holding adversely to him, and claiming title.

All that he did in fact sell, under such circumstances, was a right of action, which he could not convey. Nothing passed by the conveyance made under such eircumstances.

The heir-at-law must first gain the possession, and then he will be in a situation to convey. -1 U. C. R. 151; 2 U. C. R. 270.

Per Cur.—Rule for nonsuit absolute.

LAKE V. BRILEY.

Where there is no actual title, or claim of title, the occupant is not deemed, by construction of law, to be in possession of more land than his occupation covers; and to this occupation, when suing in trespass, he will be strictly limited.

To an action of trespass, the defendant pleaded.

1. Not guilty—2. Close not plaintiff's —3. Plaintiff not possessed. Held, per Cur. That an award could not be given in evidence by the defendant under any of these pleas.

Trespass quare clausum fregit.

The declaration was for breaking and entering the west half of 23, 4th con. of Stonington, and cutting and carrying away timber, &c.

Defendant pleaded, 1st. Not guilty.

2d. Close not plaintiff's.

3d. Plaintiff not possessed.

Plaintiff and defendant were both occupants without title; the defendant had lived long on the east half of the lot, and the plaintiff on the west half; and lately a dispute had arisen about the boundary between them. The part of the lot on which the alleged trespass was committed is towards the rear,

In September, 1846, the plaintiff had the centre line run by a surveyor, on the true course, that is, parallel with the township line: and in the following spring, by way of taking possession according to that line, he got men together, and chopped trees, and made a brush fence along the line which was thus run at his request, to divide his west half from the east half.

The defendant had not before taken any actual possession up to that line, in that part where the alleged trespass was committed-the land being unenclosed and in woods, but as soon as he found that the plaintiff had thus taken possession according to the surveyor's line, he began clearing land over the line and west of the brush fence which the plaintiff had just laid down-meaning thereby to assert a right to hold according to a line run by the compass course.

The posts at the angles of the lot in front seemed to be clearly established. It was for the chopping thus done by defendant west of the true line, that plaintiff brought this action.

On the part of the defendant, it was proved, that a few days after the new line was run, and some months before the alleged trespass, the two parties, differing about the line, submitted to arbitration by a writing under seal, "agreeing, under the penal sum of £100, to abide by the decision" (of the arbitrators named) "to arbitrate a matter concerning lines lately run between them by Mr. Piney, the surveyor." And it was shewn, that the arbitrators had on the same day, 7th September, 1846, made an award in writing (not under seal) that the parties should equally divide the land in dispute, and that Lake should pay Briley 17l. 10s., and the payment to be made when possession was given, and possession given when payment made or tendered.

The defendant relied on this award as equivalent to an arrangement between the parties themselves that the defendant, being recognized as then in actual possession, should retain it till 17*l*. 10*s*. should be paid to him by the plaintiff.

The learned judge at the trial gave no effect to the award in his charge to the jury, and desired them to consider whether plaintiff was really in possession of the locus in quo before or at the time of the alleged trespass; or whether, while the defendant was in actual possession, the plaintiff entered without his consent, in which case the defendant immediately thereafter resuming his possession would not be a trespass for which plaintiff could bring any action.

The jury found for the plaintiff, and one shilling damages.

Henderson, of Kingston, obtained a rule for a new trial on the law and evidence, and for rejection of evidence. He contended that the plaintiff had not, under the circumstances, that exclusive possession which could enable him to maintain trespass. He cited 5 E. R. 485; 11 L. J. 49; 1 T. R. 428; 1 B. & C. 421; 3 M. & S. 799.

McKenzie, of Kingston, shewed cause. The jury have expressly found that the plaintiff was in the exclusive occupation of the ground on which the trespass was committed. The possession being entirely a matter of fact, and not depending on any construction of law under a paper title (for both were squatters), the defendant can only be regarded as in the occupation of what he was really occupying; and the jury having found that the actual occupation of the locus in quo was in the plaintiff—the defendant having no constructive occupation beyond that which was actual—the plaintiff, it is submitted, will be entitled to hold his verdict.

Robinson, C. J., delivered the judgment of the court.

The plaintiff's counsel, on the argument, declared his willingness to consent to a new trial on payment of costs, and therefore we have only to consider whether there is any ground on which the verdict could be properly set aside without costs, as being absolutely contrary to law, or rendered in consequence of misdirection.

There is no such ground. The jury, upon that point being left to them to determine, found that the defendant was not in possession of the locus in quo, when the plaintiff put his fence down to mark the boundary. That being so, the first exclusive, actual occupation was by the plaintiff, and then the defendant entered and committed the act which was a trespass against that possession; and the finding of the jury was consistent with the evidence, for where there is no actual title, or claim or pretence of title, the occupant is not deemed by construction to be in possession of more than his occupation covers. That is the distinction between possession upon a claim of right and a mere intrusion.

Then as to the award between the parties, it was clearly not admissible evidence under any of the pleas. The trespass, that is, the act complained of, was committed; the land was plaintiff's sufficiently for

the purpose of this action; and he was in actual possession at the time of the tresspass. The award disproved none of these facts, and therefore could not support any of the three pleas. If it could have constituted a defence, it could have done so only on a plea of a different description from those on the record.

Per Cur.—Rule discharged.

DOE DEM. WEISENBERGER V. McGLENNON.

The 18th clause of the Land Sale Act, 4 & 5 Vic., ch. 100, does not apply to clergy Semble.—per McLean, J.: that the 18th clause of the Land Sale Act does not apply to the assignees of purchasers.

Ejectment for the south part of lot No. 8, in the broken front, concessions B. & C., of the township of Haldimand.

Plaintiff made title under the provincial statute 4 & 5 Vic., ch. 100, sec. 18, the Land Sale Act, and produced the receipt of the crown land agent for the District of Newcastle, dated 20th April, 1847, for 601. 6s., being the first instalment received from Elijah Steele, as the purchaser from government of the premises in question, a clergy reserve.

The receipt expresses, "that the land had been sold to him upon con-"dition of actual settlement, and of paying the residue of the purchase "money in nine equal, annual instalments, on the 1st of January in each "year. And upon the further condition, that this sale does not confer "upon the purchaser any right to cut or remove any timber (except for "the purpose of clearing and building upon the land), until the whole "of the purchase money shall have been paid."

He further proved, that by a sealed writing indorsed on the receipt, Elijah Steele had, on the 25th April, 1847, assigned all his right and interest in the premises to the lessor of the plaintiff, for a consideration of 751.

It was proved that Elijah Steele had been in possession of this clergy reserve thirty years ago, whether under any lease from the government or not was not precisely proved; that on 23rd of February, 1842, he had, by an instrument under seal, sold all his interest in the south fifty acres of lot A., in the broken front concession B., to one William Beatty, in consideration of 50l. acknowledged to be paid. And on the 11th Dec., 1844, William Beatty, in like manner by an instrument under seal, assigned this same fifty acres to the defendant in this action for 75l.

On the 24th December, 1844, Elijah Steele, by writing under seal, assigned to the defendant in this suit all his interest in the same fifty acres, together with the broken front, in consideration of 91. 10s., to be paid to him yearly.

So far as this relates to the same land, it would appear to be intended as a confirmation of the title derived by the defendant from Beatty, to whom Steele had assigned; but it includes also a tract besides the fifty acres in concession B., and it was explained by a witness on trial, that the tract in front of concession B. is called concession C.

It was proved that Beatty took possession under the assignment made to him in 1842; and that the defendant, when he purchased from him, went into possession, and has continued on the lot.

It seemed to be conceded on the trial, that Steele had held a lease of this clergy reserve, which had expired; but it was not shewn, nor was it proved, when the lease expired.

The learned judge was moved to grant a nonsuit on several grounds.

It was objected, that the Statute 4 & 5 Vic., ch. 100, sec. 18, which enables vendees of crown lands, in certain cases, to maintain actions in respects to the lands contracted for, although no patent has yet issued, does not apply in this case, because this land is a clergy reserve, and so not within that statute.

2ndly. Because the receipt could only be evidence of title, under the statute, in the hands of the original purchaser; that it was not assignable, and, at all events, not till the vendee had entered, there being another person at the time in possession.

3rdly. That plaintiff could at least not recover without a previous demand of possession.

4thly. That this defendant could not, under the circumstances, be regarded as a wrongful possessor, liable to an action at the suit of Steele or his assignee, under the 18th clause of the act.

Leave was reserved to enter a nonsuit, or a verdict for plaintiff or defendant, according to the opinion of this court.

The jury found that the defendant was lawfully in possession, and had a right to pre-emption, and they gave their verdict for the defendant.

P. M. Vankoughnet moved on the leave reserved, and renewed the objections above mentioned.

D. B. Read shewed cause.

ROBINSON, C. J.—I am of opinion that the verdict for the defendant should stand; because I consider that the 18th clause of the Land Sale Act, and indeed the whole act, has no application to clergy reserves, but to the other public lands of the crown which had been ordinarily vacant and grantable, and respecting which alone the colonial legislature were by that act, in my opinion, prescribing regulations.

I have given my reasons for this opinion in the case of Byers v. Moore, 5 U. C. R. 4, and need not repeat them here. If in any case hitherto decided, an action has been sustained by us upon a certificate granted under the 18th clause of this statute, where the land in question had been sold as a clergy reserve, the fact of its being a clergy reserve was not brought to the knowledge or notice of the court, or at least no point was raised upon it.

It is unnecessary to determine the other points. Indeed, without knowing when the government lease expired, which Steele had held, it is not clear what the merits of the case really are. If it had expired before 1842, when he sold all his interest in one parcel to Beatty, from whom this defendant purchased, as he did in 1844 to the defendant himself as regarded the other parcel, then it seems clear that he meant to transfer to him whatever equitable right he could have, so that defendant, and not he, should be the person entitled to pre-emption from the government; and if so, his going afterwards and applying himself to be allowed to purchase was fraudulent, and upon a proper proceeding would probably make void the patent, if he had obtained it.

And under such circumstances, I do not at present admit, that if the land had been crown land, sold under the statute 4 & 5 Vic., ch. 100.

the defendant could be treated by the plaintiff as being wrongfully in possession, so that he could sustain an action against him as a trespasser under the 18th clause, and not without any notice or demand of possession.

McLean, J. - By the 18th sec. of the act for the sale of public lands, the district agents are required to give to the purchasers of land a receipt for the purchase-money which they may receive, specifying therein the number of the lot or the land purchased, or otherwise sufficiently describing the same; and such receipt shall authorise the purchaser to take immediate possession of the lot sold, and to maintain actions and suits in law or equity against any wrongful possessor or trespasser on such land, as fully and effectually as if the patent deed had issued on the day of the date of such receipt. If the premises in this case could be regarded as public lands, within the meaning of that act, then the purchaser, Steele, would be entitled to recover on the receipt given to him, in the same manner as if he held a patent from the crown; but the intention of the act being, to enable purchasers to get into possession of lands without waiting for the payment of the whole purchase-money by instalments, it does not provide that such actions may be brought by the assignees, and no such right can be recognized in this case.

Besides, I think it is quite clear that clergy reserves cannot be considered as "public lands," to be sold under that act.

These reserves were made, under authority of an imperial statute, for a particular object; and the manner in which the reservation was to be made, was provided for by that statute. When set apart in the mode prescribed, they were no longer subject to be sold or disposed of by the crown, as public lands; they are now, however, liable to be sold, under an act of the imperial parliament, and under regulations made by the executive government, approved of by her Majesty.

By former enactments, which are repealed by the act 4 & 5 Vic. ch. 100, any scrip issued in satisfaction of claims for free grants of land, might be taken in payment of clergy reserves, the proceeds of which were not subject to the disposition of the provincial legislature, and the amount of such scrip was to be made good to the clergy reserve fund, from monies received for sales of crown lands; and by the last clause of the act now in force for the sale of crown lands, the distinction between clergy reserves and crown lands, is clearly recognized. It recites, that "Whereas, by "reason of the receipt of land rights in lieu of money, in payment upon "sales of clergy reserves, in that part of the province lately called Upper "Canada, a certain sum of money is due and owing to the fund arising "from the proceeds of clergy reserves, which under the act thereby repealed "was to be repaid out of the proceeds of the land of the crown;" and it then authorises the commissioner of crown lands to pay over all proceeds of crown lands, until the debt due to the clergy reserve fund shall be fully discharged.

The act provides for the sale of "public lands," and the provisions of the clause referred to apply to "crown lands," shewing the lands to which the act was to apply.

The clergy reserves being recognized then by this act as not being public lands, and such reserves being sold under other and distinct regulations, the receipt for the purchase-money does not confer the same right to sue as in the case of a sale of crown lands.

The agents of the commissioners of crown lands in the several districts, are also agents for the sale of clergy reserves, but not necessarily so. They proceed, in the one case, under the authority of the provincial statute; in the other, under the regulations established by the government, and approved of by her Majesty, under an act of the imperial parliament.

The plaintiff not having shewn any legal right to recover in this case, the rule for a new trial must be discharged.

MACAULAY, J., and Jones, J., concurred.

Per Cur.--Rule discharged.

Brown v. Shea.

A defendant sued in trespass for a false arrest, and intending to urge in his defence, A detendant such in trespass for a late arrest, and mending to trige in insiderence, that he arrested as a constable, and that the action against him was brought in a wrong county, will not be entitled to do so, if he has omitted to insert in the margin of his plea "by statute," unless the court can say, upon the facts proved at the close of the plaintiff's case, that the defendant was acting as a constable.

Semble: that a constable in a civil proceeding has no colour or pretence for acting

without authority specially given by some process.

Quære, in an attachment of privilege within the 9th clause of the 2 Geo. IV? And Quære—Would this doubt, or the want of an affidavit being annexed to a ballable process, prevent the defendant, a constable, from having the benefit of the 21 Jac. I., on on the point of venue?

Trespass, battery and false imprisonment.

Plea, general issue.

Defendant is a constable, and it was proved that in September, 1846, he had plaintiff in his custody in Murray, in the District of Newcastle, and took him to Belleville, in the District of Victoria, and afterwards to Cobourg, in the District of Newcastle, where he was detained in close custody, as a debtor, nearly two months.

The writ was not proved or produced at the trial.

The jury found for plaintiff, 501. damages.

D. B. Read moved a nonsuit on the leave reserved. He contended, that as it was proved the defondant was acting as a constable, he was entitled, under the statute 21 Jac. I., ch. 52, sec. 6, to have the venue laid in the district in which the arrest took place. That by stat. 2 Geo-IV., ch. 1, sec. 9, any constable might arrest on a bailable writ of ca. re.. and, having an affidavit of debt annexed, might deliver the debtor over to the sheriff; that though the affidavit was not annexed to the process, still it was but an irregularity, of which the constable could know nothing; that the venue being wrongly laid, the plaintiff must be nonsuited. He cited 2 Stark. C. 445; 5 Moore, 322; 1 B. & Al. 227; 6 A. & E. 663; 9 E. R. 364; 5 E R. 233; 5 T. R. 1; 10 B. & C. 277; 14 M. & W. 235; 8 Jur. part 1, pages 307, 320, 327, 362, 399, 419.

R. McKenzie, of Kingston, shewed cause. He contended that there was an imprisonment in both districts, and therefore that the venue might be properly laid in either; that a constable had, as such, nothing to do with the execution of civil process, and that when he assumed to act in such capacity, having no warrant as sheriff's officer, he was not entitled to the protection of the statute 21 Jac. I., ch. 5. And that if a ca. re., with the affidavit of debt annexed, had been given to him, and he had acted upon it, he would still not have come within the statute; but that

not being shewn in evidence to have had such a process, he had no pretence for claiming any privilege as to venue. He cited 6 B. & C. 354; 4 T. R. 485; 2 B. & C. 729; 9 C. & P. 621; 1 C. & M. 9, 17.

ROBINSON, C. J., delivered the judgment of the court.

I am sorry that there does not appear to be any clear ground on which we can make the rule absolute in this case; for the verdict gives damages, which will probably press heavily upon the defendant, for an act which he may have thought it his duty to do as constable; and the plaintiff was liable to the imprisonment which he suffered, although there has been such an irregulurity as gives him a ground of action.

There was some evidence, however, given at the trial, which would justify the jury in thinking that the defendant acted in the matter in a vindictive spirit. Considering the imprisonment suffered, the damages are not so excessive that we could properly interfere on that ground.

The defendant's counsel claimed the benefit of the 5th sec. of 21 Jac. I., ch. 12, which provides, that in actions against constables, "for or "concerning any matter or thing done by them, by virtue or reason of their "office, the action shall be laid in the county where the tresspass was "committed, and not elsewhere; and that if upon the trial the plaintiff "shall not prove, that the trespass was committed in the county in which "he has brought his action, then the jury shall find the defendants not "guilty." And this statute also extends and makes perpetual the protection given by 7 Jac. I., ch. 5: "that if any action shall be brought "against any constable, for any matter or thing by him done by virtue or "reason of his office, it shall be lawful for him to plead the general issue, "and to give such special matter in evidence to the jury which shall try "the cause, which special matter being pleaded had been a good and sufficient matter in law, to have discharged the defendant of the trespass."

This latter provision has been held to admit under the general issue, not merely the evidence of such defence as would entitle the defendant to be acquitted upon the merits, but also evidence of the capacity in which he was acting, for the purpose merely of letting in the objection, that the action was not brought in time, or notice not given, or the action brought in a wrong county.

But in this case, the defendant having omitted to insert in the margin of his plea the words "by statute," as required by the 19th rule of Easter Term, 5 Vic., he has not entitled himself to this protection, unless we can say that it appeared, upon the facts proved at the close of the plaintiff's case, that defendant was acting as a constable.

We cannot hold that the plaintiff's evidence did establish that, for no writ was produced or proved at the trial. We can only see that the defendant claimed to have a right to arrest this plaintiff, by virtue of a process which he said he had; and we are told in the argument, that it was an attachment of privilege at the suit of an attorney, which had been sued out and used as a process coming under the 9th clause of 2 Geo. IV., ch. 1.

If it had been shewn that there really was any such process, then the question would have arisen, whether this defendant as a constable could execute it without any warrant from the sheriff? In other words, whether an attachment of privilege, though it is not a capias ad respondendum, may not come within the reason and spirit of that provision?

If it could be so held, still there was the effect here, that it is admitted there was no affidavit of debt annexed.

This being a civil proceeding, with which a constable virtute officii merely has nothing to do, and in which he can have no colour or pretence for acting (as he may in matters which regard the public peace), without authority specially given by some process, we cannot, until it has been proved he had such process, recognize him as acting in his capacity of constable.

If it had been shewn, by the plaintiff's own evidence on the trial, that the defendant was really acting upon a process of that kind, then the rule of Easter Term, 5 Vic., would not apply, and probably the want of the affidavit being annexed, or the doubt whether the attachment of privilege is within the 9th clause of the 2 Geo. IV., would not prevent his having the benefit of the 21 Jac. I., on the point of venue.

But after all, he could not be held entitled to a verdict, because the plaintiff was in fact illegally in the defendant's custody in the District of Victoria, where the action is laid, as well as in the District of Newcastle, though the longest period of false imprisonment was suffered in the latter.

Per Cur.-Rule discharged.

JONES V. DUFF.

In an action for malicious arrest, the defendant cannot succeed in bane in nonsuiting the plaintiff, or in obtaining a new trial, on the ground that no probable cause was shewn, if he took no such objection either at the trial or in moving for his rule.

The court will not act upon affidavits stating conversations with one of the jury, after the trial, respecting the ground of their verdict.

Case for malicious arrest. Affidavit made by defendant as agent for McMicking.

The charge was, that defendant had no reason to believe that plaintiff was immediately about to leave Upper Canada, with intent, &c.

Plea, general issue. Verdict for plaintiff, 5l.

It was proved that the defendant, who took out the capies ad respondendum on instructions which he had received from the plaintiff in the original action, was advised by the person who had indorsed the note to the plaintiff, on which the action was brought, that the present plaintiff, Jones, was likely to leave the country, if an action should be brought against him by non-bailable process, and that it would be necessary to have him arrested.

And it was further proved, that the plaintiff, Jones, was possessed of no property, real or personal; that he had at a former period conveyed his lands and goods, and even made over his debts to a third party, apparently to avoid their being taken by his creditors; and had spoken of going to the United States, from which country he had come, in case of any proceedings being taken against him. These circumstances were not of recent date, but were sworn to as having taken place a year or two before the process complained of was taken out. Whether the circumstances of the plaintiff had become so changed in the meantime, as to make it unreasonable to give any weight to them, did not appear.

Under the circumstances, the learned judge left the case to the jury, with a charge highly favourable to the defendant.

It did not seem to have been contended at the trial, that the evidence entitled the defendant absolutely to an acquittal, and the course taken by the learned judge was not objected to.

ROBINSON, C. J., delivered the judgment of the court.

If it were supposed that the plaintiff should have been nonsuited, or a verdict entered for the defendant, on the ground that want of probable cause was not made out—treating that as a question to be disposed of by the court—the defendant should have contended for that at the trial, or should at least have made it a ground of his application for a new trial.

The affidavit which has been filed, stating conversations with one of the jury after the trial, respecting the grounds of their verdict, is not such as we can act upon. It would be contrary to the uniform practice to entertain it. The verdict is not a satisfactory one, I think, but the damages are small; and we see no ground on which we can properly make the rule which has been moved, absolute, unless we were to make the payment of costs a condition, and it would be contrary to the usual course, to set aside the verdict on such terms, when the damages are so small.

Per Cur. - Rule discharged.

PORT CREDIT HARBOUR COMPANY V. JONES ET AL.

Under the statute, 4 Will. IV. ch. 32, sec. 5, parties receiving benefit from the Port Credit Harbour, in its present unfinished state, must pay the tolls prescribed.

Assumpsit for tolls.

Pleas, general issue, payment and set-off.

Verdict for plaintiff, 981. 13s. 11d.

The only question at the trial was, whether plaintiffs could compel defendants to pay toll, as it appears the harbour is not perfect, as intended by the act.

The learned judge ruled, that according to former decisions of this court, the defendants having received benefit and accommodation from the harbour in its present state, must pay the tolls prescribed.

A new trial was moved for by J. H. Hagarty, on the law and evidence.

J. C. Morrison shewed cause.

The argument is stated in the judgment of court.

ROBINSON, C. J., delivered the judgment of the court.

The former decisions alluded to, were in relation to other chartered companies, impowered to impose tolls on similar works; and it is of course always material to refer to the particular statute by which the authority is given. That which relates to the Credit Harbour Company, 4 Will. IV. ch. 32, provides in sec. 5th, "that as soon as the said harbour shall "be so far completed as to be capable of receiving and sheltering vessels, "the said company shall have full power and authority to demand cer"tain tolls set down in the act."

It was shewn in this case, that the harbour was and is capable of receiving and sheltering vessels, and that the defendants' schooner, as well as others, has in consequence of the artifical harbour made, been enabled to go into the basin within the bar, and return into the lake, which had been formerly impossible.

It is very notorious, that the harbour at Port Credit is daily resorted to in the season of navigation, by steamers and other vessels.

The defendants contend, that their actually using the artificial channel between the piers, for getting into the basin, was not voluntary on their part; for that the company, having occupied by their works the natural channel of the creek, have excluded them from entering otherwise. But although it may be true, that for a short time in the spring, while the high water is running off, they might have been able to enter with their schooner if the outlet had been left in its natural state, yet they did not pretend to prove, that at the season when their vessel went through the harbour to their store-house in the basin, and returned with her cargo, it would have been possible for her to have done so, if the outlet of the creek had been left in its natural state. I see no pretence for the defendants disputing their liability to pay toll.

Per Cur. - Rule discharged.

RALPH. ADMINISTRATRIX, V. LINK.

A makes an agreement with B. to work a mill on shares—A., who owned the mill, to have two-thirds, and B., who worked it, one-third of the toll. After some years, B. is taken dangerously ill; and about an hour before his death, sends for A., and tells him—having first requested those about him to leave the room—that there is about 300 bushels of toll-wheat in the mill, undivided, 100 of which, under the agreement, would be his (B.'s); that as he (B.) owed him (A.) for money lent, he begged he would accept the other 100 bushels, and also a promissory note, which he sent for and hauded him. Witnessess, who over-heard part of the conversation, swore to the 100 bushels and the note being given by B., not as a gift—but as they heard B. say—in payment of a past debt.

Held per Cur., in an action of trover, brought by B's administratrix to recover from A. the wheat and note, that upon these facts, the question of delivery, as upon a "donatio mortis causa," did not arise—the transaction being nothing more than an ordinary sale, for a valuable consideration—that if it had—the wheat being already in A.'s own mill—no furthur delivery could be required.

Held also, that the agreement, being personal between A. & B.—and B., the intestate, having no term in the mill—his administratrix had no right of possession, and could not support the action.

Trover, for a promisssory note, and for some flour and wheat.

Pleas, 1st. Not guilty to both counts.

2nd. To first count, plaintiff not possessed.

3rd To second count, same plea.

The facts were these:—Defendant owned a grist-mill, and had made an agreement with the intestate (Ralph) to attend the mill on shares; defendant was to have two-thirds of the toll, and intestate was to do all the work, tind the oil, and keep the mill in repair, and have one-third of the toll.

The toll, as it was received, was kept altogether in the mill and

divided from time to time, according to the agreement. While the intestate was in the mill on these terms, he took ill and died. Just before his death, and when he felt that he was dying, he sent for the defendant to come to him; and when he arrived, the intestate told him that he thought there were about 300 bushels of wheat undivided, of which there would be 100 for intestate's share, and that he wished defendant to take it. Defendant asked, why he wished him to take it? He said to pay the defendant for money [which he had borrowed of him. He then desired his wife to bring him a bundle of papers, in which was a note given by defendant and held by the intestate; and having got it, he desired his wife and others to leave the room, and remained some minutes in conversation with defendant alone.

There was no doubt that he gave the note to the defendant on that occasion, for he was seen to do it; and there were persons present who heard enough of the conversation to be positive that the intestate desired the defendant to accept the note, and his share of the wheat, which was then in the same heaps with the defendant's, undivided; and that he did not propose to him to take either as a gift, but in consideration, as he stated or intimated, of money lent him by defendant; or rather, as it appeared to the by-standers, in consideration of circumstances which he was unwilling to state in the presence of his wife and of strangers, but wished to disclose, and did disclose, to the defendant, when he had the private conversation with him.

The defendant could not prove the particulars of that conversation on the trial; but the jury must have thought, that the intestate felt that he justly owed a reparation to the defendant for some injustice done him in the former division of the toll or otherwise, and that his conscience compelled him to make such restitution as he could. The defendant immediately after declared, that he could put no other construction upon it.

The plaintiff his widow, who had administered to the estate, was proved to have admitted afterwards, that the intestate had given the wheat to the defendant for money which defendant had lent to him; and that seems to have been the colour which the deceased preferred giving to it, rather than disclose to his family the true nature of the claim.

The intestate died within an hour after, continuing clear in his intellect to the last.

Not long after his death, the defendant ground up the toll-wheat in the mill, which included the share that would have fallen to the intestate. It proved to be rather less than 100 bushels, the quantity which the intestate supposed his share would come to.

The plaintiff, as administratrix, sued for this, as for the conversion of the goods of the estate.

Verdict for the defendant.

McDonell, of Greenfield, moved for a new trial, on the law and evidence and for misdirection.

He contended, that no actual delivery of the wheat having taken place at the time of the alleged gift, it could not take effect as a donnato mortis causa. He relied upon the following authorities to shew that the action could not be sustained.—I Gale, 127; 7 Taunt. 229; 2 B. & Ald. 551; 2 Esp. C. 163; 3. P. Wm. 856; 5 Madd. 351.

McKenzie, of Kingston, shewed cause. Besides contending that any actual delivery of the wheat was, under the circumstances of the case, unnecessary, he objected that, at all events, the wheat, as it was left by the intestate, undivided, was in the joint possession of the two; that no part of it was the exclusive property of the intestate, or of his administratrix, and that therefore trover could not lie against the other tenant in common of the property. He cited 2 Ves. Sen. 434; Stra. 953; Holt. 10; 1 Taunt. 241; 1 E. R. 363.

ROBINSON, C. J., delivered the judgment of the court.

The right of action, so far as it related to the note, is not insisted on by the plaintiff, and it is clear the evidence did not sustain it. The question is confined to the plaintiff's right to recover for the flour and wheat.

I am clear that we ought not to disturb the verdict for the defendant.

The argument, and the authorities cited to show the necessity of an actual delivery over of the chattel in all cases of *donatio mortis causâ*, are wholly beside the case.

This was no case of a gift, intended only to take effect in case the donor died. It was not indeed a gift at all; if it were, then the question, as to the necessity of an actual delivery over of possession, would have applied, as much if it had been a donatio inter vivos, as in case of a donatio mortis causa.

The light in which the jury were well warranted in viewing this transaction was, that it was an acknowledgement by the intestate, that all the wheat remaining in the mill was justly the defendant's; and that the note too would not more than compensate him for what ought to have been delivered before. It was a transfer of the property, or a relinquishment of all the intestate's right in it, for an admitted valuable consideration, not distinguishable in principle from an ordinary sale. It required no present, actual delivery.

In effect, this intestate acknowledged that the whole of the wheat was the defendant's. How could be deliver it more than he did, under the circumstances, if a delivery had been requisite? The mill was the defendant's, in which the wheat was stored, and the moment the intestate died, the agreement between him and the defendant was necessarily at an end, and all the property was in defendant's possession. The intestate had no term in the mill. His administrator had no right to possession, for the agreement to rent the mill was of a personal nature, and not binding on the administrator.

But these are considerations not material to the case. The jury did right, in such a case, to take a view of the case as favourable to the defendant as the facts would warrant, so far as they were disclosed, because they could have no reasonable doubt, that what passed privately between the deceased and the defendant would have made the case plainer in favour of the defendant, if it could have been shewn to them, which from the nature of the thing it could not be. There was nothing to lead to the supposition that the intestate intended to bestow the wheat as a mere gift. He resigned his claim to it, as property, which, for reasons known to him, belonged really to the defendant.

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HAMILTON, ADMINISTRATOR OF HAMILTON, V. MATTHEWS.

Quære.—When can an account be considered an open, unsettled account—so as to defeat the operation of the Statute of Limitations, by the latter items in the account drawing the others with them?

The plaintiff declared on the common counts, for goods sold and delivered, money paid, lent, and had and received, and account stated, laying promises only to the intestate—and on an account stated.

Defendant pleaded, amongst other things, that the action did not accrue within six years. Issue thereon.

No subsequent promise replied.

The plaintiff put in a long account against defendant of long standing; proved by general evidence of dealing between the parties, and by evidence of defendant's, admitting its correctness since the death of intestate; but whether since administration granted not distinctly appearing.

It was left to the jury as sufficient evidence to take the case out of the Statute of Limitations, and they found for plaintiff.

Defendant had a set-off, which was put in and admitted; but no running account with credits given by intestate appeared; nor were the parties merchants.

The record was entitled 19th August, 1847.

Plaintiff's full account was from 1837, to March, 1844	£104	2	3
Of which is more than six years' old, say	34	2	3
Companies note 07 162 2d and 5 wagne's intersect	£70	0	0
Separate note 9l 16s 8d, and 5 years' interest say 3l	12	16	8
•	£82	16	8
Defendant's set off in all £23 17 3\frac{1}{2}			
Exceeding six years 10 10 1½	£13	7	2
	£69	19	6
Verdict in			
Difference £19 1 5			
Interest on 691. 19s. 6d. to be added, say four years		•	
on 70 <i>l</i>	£16	- 8	0

A. Wilson obtained a rule for setting the verdict aside, on the grounds, that the demand was in a great many particulars outlawed, and that no sufficient evidence was given to recover the same. He cited 4 M. & G. 271.

J. H. Hagarty shewed cause. He cited 1 U. C. R. 235; Roscoe, 322; 6 T. R. 189.

ROBINSON, C. J.—The evidence given on the trial did not amount to proof of an account stated with the administrator; what was relied upon was a conversation with a third party having no privity with these transactions.—1 Ad. & Ell. 488. In that conversation, the defendant did not

state any precise sum as being the balance due by him; but asserted that he had credits to be set against plaintiff's account, and the amount of which was yet unsettled between the plaintiff and him.

But the evidence was sufficient to shew an admission of an account for goods sold and delivered, and for money lent by the intestate, against which causes of action we have to consider the effect of the plea of the Statute of Limitations. And if the plaintiff's replication, not relying on any new promise, but averring that the causes of action did accrue within six years, which, with reference to those counts on which alone the verdict can be supported, must be taken to mean, that the causes of action for goods sold and delivered and for money lent, did accrue to the intestate within six years.

Looking at this case as one to be governed by two decisions in England, before Lord Tenterden's Act, 9 Geo. IV., I am of opinion that the verdict is supported by the evidence, on the principle on which Catling v. Skoulding was decided, and which was very like the present in its circumstances.

This is not a case in which the defendant is endeavouring to avail himself of the exception in the statute respecting merchants' accounts, as in Russell v. Robertson, decided in this court, 1 U. C. R. 235, and referred to in the argument.

The aid of that exception, when it can be called in, is required, and is available only in cases where all the items of the account are beyond the six years.

That was not the case here, but it was shewn that the defendant supplied the articles which he did, and for which he claimed a set-off, on the express understanding and with the intention that they were to go towards liquidating the account that the intestate had against him, of which there were several items furnished within six years, and during the life of the intestate.

Under the circumstances of this case, we must regard the whole account as open; the later items in the account drawing the others with them.

For those items within the six years, of which there were a good number, the plaintiff was clearly entitled to recover. Then when we find the defendant long afterwards referring to the whole account, which included those items, admitting it to be correct, and treating it as unsettled, that shews it to have been even then an open account; and if open then, it must have been an open, unsettled account at the time of the intestate's death; and this being so, the items in 1843, part of the same amount, would draw the others after them.

I do not see why this case does not come within the decision in Catling v. Skoulding, which is in support of justice, though not easy to reconcile with the statute. If all the items had been before the six years, the plaintiff could not have recovered on this evidence.

MACAULAY, J.—Taking the accounts on each side within six years from the commencement of the action, i.e., from August, 1841, and allowing interest on the balance in plaintiff's favour, the amount due by defendant, irrespective of the Statute of Limitations, would be very nearly if not quite equal to the verdict. At all events, the plaintiff is clearly entitled to a large portion thereof; and had a count been added, laying a promise to the plaintiff as administrator, the evidence of the defendant's

admissions, apparently since the grant of administration, would have chitled him to recover thereon the full amount due.—3 B. & C. 357; 5 D. & R. 224; 1 H. B. 241; 6 T. R. 189; Catling v Skoulding, commented upon in the following cases:—2 Saund. 127, b; 4 M. & G. 271; 8 M. & W. 769; 1 Dea. R. 543-551; 1 M. & R. 359.

Per Cur--Rule discharged.

DOE DEM. BALDWIN V. WENTZ.

Where a record has been lost just before the assizes—the attorneys on both sides cannot agree to substitute for it a record which has not been passed in the principal office, and which has not been sealed. A verdict had upon such a record will be set aside as upon an illegal trial.

In this case a verdict was rendered for the defendant; and the plaintiff moved for a new trial on the law and evidence. The point in dispute was whether the defendant, the owner of a certain lot C. in the town of Kingston, had not wrongfully encroached upon a water lot No. 3 in front of him, belonging to the lessor of the plaintiff, by throwing in stone and rubbish, and thus making land to a considerable extent, which it is contended he has done, and enclosed it by a fence as part of his lot C., and so excluding the lessor of the plaintiff from the possession.

The defendant endeavoured to shew that he had not encroached, or that if he had, he had retained all that he now holds possession of for more than twenty years, so that the plaintiff's title was extinguished.

Upon the point of twenty years' possession the case went to the jury, and they found for the defendant.

A. Wilson moved for a new trial on the evidence, and for misdirection. McKenzie shewed cause, and cited 2 Campb. 274; 6 C. & P. 308; 3 M. & G. 229.

Robinson, C. J., delivered the judgment of the court.

Upon looking deliberately at the papers, we see, in the first place that we cannot avoid setting aside what is called the verdict, because the case has not been properly tried, upon anything that we can recognize as a record.

I imagined from the indorsement upon what washanded up to me at Nisi Prius as the Nisi Prius record, that the parties had by consent allowed the making up and entering of a new record, in place of one which it seems had been lost, and which had been entered at the previous assizes and stood over as a remanct.

But this was not the case; having lost the former record, they agreed, it seems, to substitute a mere semblance of a record for it, which had not been passed in the principal office, and was not scaled as it should have been. There has, therefore, been no legal trial.

The consent rule also was not signed by the officer of the court.

The verdict must be set aside without costs, as both parties concurred in the irregularity; and we observe that the plaintiff will find it necessary to go to trial upon a declaration differently framed, for it was clear that as it stands at present, he can only recover land covered with water; his description in terms commences at the water's edge, and follows the water ine, so that he claims nothing that is now dry land.

The consent rule also is irreconcilable with it.

This was noticed by me at the trial, and I think a recovery on the declaration as it stands, would give to the plaintiff nothing that he goes for.

Per Cur. -- Verdict set aside without costs.

McLaren v. Rice.

A party, obtaining from the crown agent a license to enter upon certain land, and to cut such a quantity of timber of particular dimensions as he might require, not having, by such license, the exclusive possession of the land—cannot maintain trespass.

Trespass quare clausum fregit.

Second count, taking timber of the plaintiff's.

Pleas, 1. Not guilty.

2. The close not the close of plaintiff.

3. The goods not the goods of plaintiff.

The plaintiff had obtained from the crown agent a license to enter upon certain lands in the District of Bathurst, and to cut therefrom as many trees as he should see fit for making square timber, and to transport the same through the ungranted lands of the crown, in order to their being conveyed to market. The license to endure for nine months.

There was a clause in the license, that in order more effectually to protect the party obtaining the license from trespassers, he should be authorized to take at his own cost, all necessary legal proceedings in the name of the crown, as well to convict offenders, as to obtain an adjudication and possession of the timber not within the limits of his license. And it was provided, that no white pine should be cut measuring less than 70 feet per stick, nor red-pine less than 38 feet, nor oak less than 34 feet.

The plaintiff's counsel, on opening his case, stated that his action was brought against defendant, for entering on lands embraced within this license and cutting down trees thereon. Whereupon the learned judge directed a nonsuit, holding that the license gave no exclusive right of possession of the land, but merely permission to the plaintiff to enter and cut such quantity of timber of particular dimensions as plaintiff might desire to cut.

Vankoughnet moved to set the nonsuit aside, and cited 8 Jurist. 782.

Wilson shewed cause, and cited 6 B. & C. 574; 6 E. R. 602; Monahan v. Foley, 4 U. C. R. 129.

ROBINSON, C. J., delivered the judgment of the court.

The case of Monahan v. Foley, 4 U. C. R. 129, was the same in effect as this, and in accordance with the judgment given then, we consider that the nonsuit was proper, and that this rule must be discharged.

The plaintiff had not any title in the land, nor a right to the exclusive possession of it, but only a permission to cut trees of a certain description upon it.

If the defendant impeded him in the legal enjoyment of his license, there is a proper remedy for that injury; but the plaintiff could not complain that defendant trespassed upon his soil.

It does not appear that the trees which the defendant cut and took away, were of the kind that the plaintiff was licensed to cut; but if they

were, that would not make them the property of the plaintiff. And this point must have been so understood by the plaintiff when he took his license, for the government agent stipulates, that he may take proceedings in the name of the crown, to possess himself of any timber that may be so cut.

Per Cur. - Rule discharged.

CUVILLIER ET AL. V. FRASER.

Where a note—when overdue—has been retired and settled by the substitution of a renewal note—the original note is cancelled, and cannot be put in circulation again, even by the payee, who has taken up the renewal note out of his own funds.

JONES, J. dissentiente.

Semble, that under the pleas (as given in the statement of the case), the cancellation of the first note by the substitution of the second, could not be given in evidence.

Plaintiffs declared in assumpsit against defendant as maker of a promissory note. The declaration (1st count) averred, that defendant, on 21st April, 1845, made his promissory note, promising to pay to Duncan McDonell or order, at the office of the Commercial Bank at Brockville, 1051. in four months. That Duncan McDonell afterwards duly endorsed and delivered the note to one Alexander McDonell; and that the said Alexander McDonell afterwards duly endorsed and delivered the said note to the plaintiffs, whereby the defendant became liable to pay the plaintiffs, &c.

Defendant pleaded, 1st that he did not make the note.

2ndly. That the said Alexander McDonell did not indorse the said promissory note to the said plaintiffs, as in that count alleged, etc.

3rdly. That defendant made the note for the accommodation of Duncan McDonell; and that plaintiffs gave no value for the note, and received it after it had become due.

4thly. That plaintiffs were suing as agents of Dunean McDonell and defendant advanced, by way of set-off, demands against Dunean McDonell.

5thly. That defendant delivered to Duncan McDonell 108 bushels of oats, of the value of 10*l*., in satisfaction of so much due on this note, and when he held the note; and that plaintiffs had notice of this when they took the note.

6thly. Payment of the residue to Duncan McDonell while he held the note, of which plaintiffs, before they took the note, had notice.

7thly. As to 60*l.*, parcel of the monies in the note of which Duncan McDonell was the holder, the defendant *delivered* to him a promissory note made 24th February, 1846, by Duncan McDonell, payable to Greenshields & Co., at three months, and indorsed to defendant; and that Duncan McDonell received such note in satisfaction of 60*l*. due on the note now sued on, of which plaintiffs had notice at the time when this note was indorsed to them.

A set-off was pleaded to the declaration.

Plaintiffs joined issue on the first and second pleas; replied de injuria to third and fourth; and traversed the defence in fifth, sixth and seventh pleas.

At the trial it was proved by Duncan McDonell, that the note sued on was transferred to plaintiffs, to secure certain advances which they were to make and did afterwards make to the witness; that witness when the note was made, viz., in April, 1845, had it discounted at the Commercial Bank, and when it became due, viz., in August, 1845, defendant, in order to meet that note, made another note to witness for the same amount, which witness and the same Alexander McDonell indorsed, which witness took to the bank as a renewal, and took up the note now sued on; that the witness paid and took up this substituted note at maturity, and afterwards transferred this note of 21st April, now sued on, to the plaintiffs. It was contended that under these circumstances, the plaintiffs, taking the note after it was overdue, could not recover on it, for that it was in fact improperly re-issued after it had been paid to the indorsees (the bank), and paid through means of a second note made by this defendant, which was plainly given to Duncan McDonell as a substitute for the first.

Duncan McDonell had since become bankrupt.

The learned judge considered, that the assignees were the parties entitled to the amount of the second note and interest; and that the note of April, 1845, was no longer recoverable against this defendant, the maker, but he doubted whether the facts proved were admissible as a defence under any of the pleas.

A verdict was taken plaintiffs, for 2291.1s.5d., which included another demand: with leave reserved to the defendant to move to reduce the verdict, by stricking out this note and interest, 1181.17s.5d.

Brough obtained a rule, upon the leave reserved, to reduce the verdict, or for a new trial without costs.

P. M. Vankoughnet shewed cause. He relied upon the following cases as authorities to support the verdict:—7 Ves. 597; 3 M. & S. 363; 2 C. M. & R. 471; 2 C. & J. 405; 4 Bing, 390; 1 Bing. 100; 9 L. Jour. Exch. 7; 4 Bing. N. C. 9.

He also contended, that even if the defence urged at the trial, was a valid one, there was no plea in the record upon which it could be admitted.—2 A. & E. 32; 13 M. & W. 58.

Breugh supported his rule—Contending that the original note of the 21st of April, 1845, having been retired by means of a second note of the defendant, from the holders (the Commercial Bank) from the time it was so taken up and settled, ceased to have any effect binding on the defendant; that the second note, which was given and substituted for it, having been retired when due by McDonell, with his own means, he could only recover for the original consideration of the notes, or on the second note which he had paid; that the first note having been endorsed to the plaintiffs after it became due, and while the second note was outstanding, the plaintiffs received it subject to all liabilities, and that they could not be in a better position than Duncan McDonell as to the recovery of the amount. He relied upon the cases cited by the opposite counsel, as fully establishing, when carefully examined, the defence set up by the defendant to this note.

ROBINSON, C. J.—The points to be determined are, 1. Whether the facts proved at the trial shewed that the defendant Fraser is no longer liable after what has occurred, to be sued as the maker of this notes.

2. If he is not liable, then whether the defence which the facts furnish is open to the defendant under any of his pleas.

I am of opinion that Duncan McDonell, having taken the note from the bank as he did, by depositing a renewal note signed by Fraser as maker, and indorsed by himself, as the other was, could not put that note into circulation again, even after he had paid up (which he did) the renewal note from his own funds; and certaintly could not do so in such a manner as to make an indorser subsequent to himself, which Alexander McDonell was, liable, which he would be doing, apparently at least, if these plaintiff's took the note, as the declaration states that they did, by indorsement from him.

Still, the pleas which were intended to bring up the defence, were clearly not such as the evidence can be said to have supported, unless indeed the second plea, that Alexander McDonell did not indorse the note to the plaintiffs. That plea, I think wat not proved, unless it was shewn, which I do not understand it was, that Alexander McDonell indorsed the note after Duncan McDonell had retired it from the bank, for he was discharged from any indorsement made by him before the bank became the holders, the moment that the bank received what they took as satisfaction from Fraser and Duncan McDonell, and gave up this note as in effect satisfied.

I think this point in the ease escaped attention; and that the plaintiff recovered a verdict contrary to law, and in the face of a plain defect in his case, not technical or captious, but substantially affecting his right to recover upon the case which he has stated, and I would therefore consent to a new trial being ordered without costs, but the court are not agreed on the propriety of this course. We are, however, all of opinion that the ends of justice require a new trial, and that the defendant may be allowed to amend his pleadings, with a view to placing on record such plea as he may be advised will best bring out the defence, that the note sued on was cancelled in effect and no longer negotiable after it had been taken up at the bank, by substituting a bill for it on which Fraser was liable. And a rule is ordered to this effect on payment of costs, with liberty to both parties to amend their pleadings.

MACAULAY, J.—The only question made at the trial and upon the argument in term was, whether the defendant was entitled to the verdict on the fifth and sixth pleas or issues.

It was not objected that, under the circumstances, the plaintiff could not maintain an action against Alexander McDonell, or declare against the defendant through him as indorser. The indorsements are in blank, and primâ facie the second issue was established by proof of the handwriting of Alexander McDonell, if proved, which does not appear. Had it been objected against plaintiffs' recovery, that plaintiffs could not recover as indorsers of Alexander McDonell, the plaintiffs might have moved to amend the first count by striking out that allegation; and it is probable the learned judge would have granted leave, for it has nothing to do with the merits, as respects the defendant, though it would have been otherwise if Alexander McDonell was the defendant sued as indorser.

The defendant's defence on the merits arises under the fifth and sixth issues.

As to the fifth and sixth pleas, it appears to me the evidence does not support them. In the first place, the delivery of 108 bushels of oats to Duncan McDonell is not pleaded as a set-off, but as a payment or accord and satisfaction. As a set-off it would be no defence, and as an accord and satisfaction it is unavailing for want of proof; the only evidence being of oats delivered to Duncan McDonell, long after the notes in question had been delivered to plaintiffs.—10 B. & C. 558; 4 D. 76; 10 M. & W. 696.

It was not proved as laid, that Duncan McDonell was possessed of the bill when the oats were delivered; but on the contrary, that he had previously transferred it to plaintiffs.

Then as to the residue, the evidence does not prove that the defendant paid Duncan McDonell in the manner and form alleged. To meet the facts, as they appeared in evidence, if sufficient, it should have been pleaded, that the second note was substituted and received by the Commercial Bank as the holders in payment of the first one, and in discharge of defendant therefrom.—David v. Preece et al. 5 Q. B. 440.

The pleas are bad, as being pleaded to the *promises* in the declaration as if made by Duncan McDonell instead of the defendant. In these pleas it is not alleged that the note was indorsed to plaintiffs after it was due, but that defendant had paid or satisfied Duncan McDonell, and which plaintiffs knew—facts not proved.

The abstract question, whether the facts amount to a good defence in law or not, is therefore only material as respects the propriety of allowing the defendant to amend his pleadings in order to let in such defence.

Jones, J.—For a precedent debt the defendant made the note in question to the payee, Duncan McDonell, which was discounted at the Commercial Bank, Brockville, the payee and one Alexander McDonell indorsing it. At maturity the note was retired by Duncan McDonell substituting another note for the same sum, signed and indorsed in the same way, which was retired by Duncan McDonell, both notes remaining in his hands.

In December, 1845, after the note was due, Duncan McDonell resissued it to the plaintiffs for a valuable consideration, in the state in which it was originally, with the indorsement of Alexander McDonell; the note substituted for the one in question passed into the hands of the assignees of Duncan McDonell, he having become a bankrupt, but was not returned by him as assets of his estate. Payment is resisted on the ground, that the substituted note was a payment of the one in question, and that the defendant is liable to pay the amount of the substituted note to the assignees. The plaintiff having received the note after due, received it subject to all its infirmities, and therefore if it can be regarded as paid by the substituted note, the defendant is entitled to a verdict on the count upon this note; upon that point I think the case is clear.

In Bishop v. Rowe, 3 M. & S. 363, the only question was, whether the defendant was not discharged by the laches of the holder of the substituted bill; and it was conceded by all that unless he had been guilty of laches, the action upon the original bill revived. LeBlanc, J., says, "the delivery of the substituted bill is insisted on as payment, but it is "no payment of the original bill, unless something has been done to

"discharge the party in this action from that bill." Bailey, J., says, "it seems to me that the defendant has not made out that the substituted

"bill was paid, nor that such circumstances have taken place as amount "to satisfaction."

In Clark v. Mundell, Sal. 124, it was held that a bill shall never go in discharge of a precedent debt, except that it be part of the contract that it should be so. And payment even in Goldsmith's notes is only conditional without an express agreement to be taken in cash.—Salk. 442.

In ex parte Barclay, 7 Ves. 597, it was determined that bills in lieu of which other bills are given, if permitted to remain with the holder, may be sued upon in case the latter bills are not paid.

The bill in question was given to Duncan McDonell in payment or on account of a precedent debt; the substituted note was given to Duncan McDonell to retire the first from the bank. It was so retired, and remained in the hands of Duncan McDonnell; it revived upon failure of the defendant to pay, the substituted note not having been taken up by the defendant.

The cases cited already establish, that in such case Duncan McDonell could have sued the defendant on the first note.

The next question is, could Duncan McDonell put the note in circulation? Of this I think there is no doubt, If he could himself maintain an action upon it.

Payment by the drawer of a bill, in Beck v. Robley, I H B. 89 (note), upon dishonour by the acceptor, was determined to put an end to it. But the decision was made upon the ground that the bill had been indorsed, and if it could be regarded as existing, the indorser would be liable; that is not the case however. The acceptor is liable on a bill to any bona fide holder as payee or indorsee, or to the drawer, having assets in his hands of the drawer, so that if dishonoured by the acceptor, and paid to the holder by the drawer, he can maintain an action upon it; and so I think the action was maintainable in this case. The drawer would have had no recourse upon the indorser, because he was liable to the indorser upon dishonour by the acceptor, and if circulated after payment by the drawer, the indorser could set up in his defence against the holder receiving it after due, the same defence which would avail him against an action by the drawer.

The case of Callow v. Lawrence, 3 M. & S. 97, determines, that an action may be maintained by the holder of a bill against the acceptor, who took it from the drawer, after he had paid it to an indorser upon dishonour by the acceptor. In this case the names of the indorsers on the bill had been struck out on payment by the drawer. This case establishes the right of action of the plaintiffs against the defendant, if the name of the indorser Alexander McDonell, subsequent to that of Duncan McDonell, the payee, had been struck out. But I do not see that that circumstance Duncan McDonell is the indorser to should make any difference. Alexander McDonell, who indorsed for the accommodation of Duncan, as I understand the case, and being taken up by Dunean he could have no recourse upon his indorser; and as it passed from Duncan McDonell, the indorser, Alexander McDonell, could set up the same defence against the plaintiff as he could against Duncan McDonell; he could not be prejudiced by this indorsement. No one would be liable on the note to the

plaintiff except the maker and Duncan McDonell, his indorser; it was the same as if Alexander McDonell's name had been struck off the note.

I am, therefore of opinion, that the plaintiff is entitled to his verdict upon both counts.—Story on Bills, 404, 405; 1 Wils. 46. The case of Gomez v. Berkley, 1 Wils. 46, is in point.

McLean, J.—At the trial I stated it as my opinion, that the second note was that which must be considered in existence, and on which alone an action could be sustained; that the creditors of Duncan McDonell had an interest in the amount of that note, which they could enforce through the assignee; and it was then consented that a verdict should be taken, subject to the opinion of the court as to the right of plaintiffs to recover under the circumstances shewn in evidence; the amount to be deducted from the verdict, if in the opinion of the court the verdict cannot be sustained on the first note.

It appears to me that the defendant is entitled to have the amount of the first note and interest (1181. 17s. 5d.) deducted from the verdict in this cause; that note was paid and satisfied to the holders when it became due, not by means furnished by Duncan McDonell, from whom the plaintiffs received it, but by means arising from a second note of the defendant, for the payment of which Duncan McDonell, was only security as indorser, he being bound to pay it only if the defendant did not. When this note was taken up and the new note received in its place, a new contract was entered into between the parties, which was to pay at a more distant day the original demand, and the failure to pay on that day could not revive the original contract, which had been superseded. note, instead of being given up to Duncan McDonell and remaining in his possession, had continued in the possession of the Commercial Bank, they could not, after the receipt of the second note and the payment of discount on it, have sued on the original note after default made in payment of the second. If they could, then they would be entitled to recover interest on it from the time it became due, after having extended the time of payment, and received the interest upon a new note for the same amount.

It does not appear to me that Duncan McDonell was in a better situation in that respect than the bank. He had received the amount of the first note when he negociated it with the bank; that money remained in his hands till after the second note became due, that is, from April till the latter part of November, a period of about seven months. In November he could only be called upon to pay the amount of the second note, and upon its payment he became entitled to claim from the defendant only the amount of that note, not the amount of the original note and interest; and he might sue on the note which he had paid as indorser, or for the consideration of the original debt between them. If instead of there being only one renewal there had been half-a-dozen, it could scarcely be contended, that on default made in payment of the last of the six notes by the maker, and payment to the holder by the indorser, the original and all the other notes revived; and that the indorser, in whose possession they happened to remain, could take his choice and sue upon any one of them. -Burridge v. Manners, 3 M. & S. 194-though a Bill of exchange cannot be re-issued after it is once paid, having arrived at maturity, yet if paid and afterwards indorsed before becoming due, it is a valid security in the hands of a bona fide indorsee.

The renewal note, on which alone, as it appears to me, the defendant is liable, is dated on the 20th August, 1845, and became due on the 21st November following; and by a memorandum on the face of it, stating that Duncan McDonell had paid the amount of costs, 61. 1s. and interest, it appears to have been sued by the Commercial Bank as the holders. From the amount of costs incurred, it is evident the proceedings must have been going on for a considerable time. It became due too late for any proceedings in Michaelmas Term, 1845, and any process issued could be returnable only in the next term, in February. If then proceedings were taken on the second note after it became due, it is not probable, from the amount of costs incurred, that Duncan McDonell could have taken up that note, so that he could have had it in his possession in December, 1845, (it having become due only on the 21st November,) at which time the note in question was handed over to the plaintiff. If then the defendant's second note was in the hands of the Commercial Bank as the holders for value, having a right to sue for and recover the amount, there could not in December, 1845, be two existing notes, one in the bank, and the other in the hands of Duncan McDonell, on which the defendant was liable. If only liable on one (that one in the bank), then the transfer of the other after it became due, could not affect or add to its liability. - Beck v. Robley, I H. Bl. 89, n.

But independent of these considerations, the plaintiffs claim the amount as indorsees of Alexander McDonell, and issue being taken as to his indorsement, they were bound on the trial to prove it. They did not do so, but proved the reverse, that it was received from Duncan McDonell without his intervention; and that as the amount of the demand had been paid on another note by a prior indorser, Alexander McDonell could not be liable for the amount; and never having had either of the notes in his possession, he could not transfer either.

In the case of Norris v. Aylett, 3 Camp. 329, an action was brought on a bill of exchange on which there had been a former suit, which was settled by the defendant agreeing to pay the costs, renew the bill and give a warrant of attorney to secure the amount of the debt. - See Sloman v. The bill had been renewed and the warrant of Cox. 5 Tyr, 176. attorney given, but the costs had not been paid. The plaintiff afterwards indorsed away the substituted bill, and while it was outstanding, in the hands of the indorsee, brought this action on the original bill. At the trial it was contended, that the action could not be maintained, as when it was brought the substituted bill was in the hands of an indorsee for value, to whom the defendant was liable. Lord Ellenborough held, that as the agreement was to pay the costs of the former suit, execute a warrant of attorney and give a renewed bill of exchange, if the defendant had pleaded specially, he must have set forth his agreement and averred performance; but as the costs of the former suit remained unpaid, the facts of the case furnished no defence either to be put on the record or given in evidence. That there was no extinguishment of the bill until the costs were paid; if they had been paid, that might have brought it within the case of Kerslake v. Morgan, 5 T. R. 513, but the agreement remaining unperformed, plaintiff had reserved to himself the right of making the bill available. The plaintiff had taken up the substituted

bill before the trial, after it had been dishonoured, and at the time of the trial it remained unsatisfied in his possession. Under these circumstances a verdict was rendered for the amount of the bill, the plaintiff delivering up the substituted bill to the defendant; but had the costs been paid, and the agreement thereby completed, the plaintiff's remedy on the original bill must have been at an end; this is clearly to be inferred from the decision of Lord Ellenborough in the matter. -1 M. & P. 223; Bing. 454; Chitty Jr. 1374. Now in this case a note was substituted by consent of all parties for the original note; no agreement remained unperformed on the part of the defendant; the new contract was completed, and the payee and indorser, Duncan McDonell, could not have sued on the original note after retiring the substituted one. At all events, he could not have done so without giving up the second note to the defendant. If he could not do so himself, he could not give any right to the plaintiffs, as indorsees after the note became due, to do what he could not do himself. If the plaintiffs were in possession of the substituted note, and gave it up to the defendants, there would then be an additional argument in favour of their recovery; but as that note is not within their control, but is in the hands of the assignees of a bankrupt, who have a right to enforce it, though it is not returned as part of the assets of the estate, they are not in a position to allege that the defendant will not be injured by their recovery.

If this action were brought by Duncan McDonell for the original consideration, and it were shewn that a negotiable bill or note had been given to him for the amount, he could not recover without producing the instrument, or proving it in his possession or control, or that it was destroyed. — 2 Bing. N. C. 249, S. C. 2 Scott, 423. So if the action had been in the name of McDonell on the original note, and the defendant shewed at the trial that another negotiable note had been given for it, which was then outstanding, he could not recover without producing the renewal note, or shewing that it was in his custody or control, or that it was destroyed.—
10 Moore, 477; 2 C. & P. 20; Chitty Jr. 1271. The plaintiffs stand precisely in the situation of Duncan McDonell in this case; and as the second note is not within his or their control, it appears to me that on this ground also they cannot recover, and that the amount of the note in question and interest must be deducted from the verdict.

JONES, J., dissentiente.

Per Cur.-New trial on payment of costs, with leave to amend.

WAKEFIELD V. GORRIE.

By an auctioneer's conditions of sale—purchasers to an amount exceeding 30l., were to have "six months' credit, giving approved indorsed notes." Held, per Cur. (Robinson, C. J., dissentiente)—that a purchaser over 30l., upon these terms, was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash, upon his refusal to furnish the endorsed note; and as he could not consequently be sued on the common count for goods sold and delivered until after the expiration of the credit—that to a special action brought by the auctioneer aginst the purchaser, before the credit had expired—for not giving the endorsed note when requested—a plea of set off would be inadmissible.

To an action by an auctioneer against a purchaser for goods sold—the purchaser pleaded that A. delivered the goods to the auctioneer to sell—that A. was the agent of B., to whom the goods belonged—and that he (the purchaser) had a set-off against B., which he pleaded.

Quære.—Could the purchaser plead this set-off against B., without further alleging that the auctioneer sold the goods to him as the goods of B.? (Robinson, C. J., was of opinion that he could not.—Jones, J., contra.—Macaulay, J., and McLean, J., gave no opinion on this point, as the decision of the court upon the other point, decided the demurrer in the plaintiff's favour.)

First count. That on 27th Oct., A. D. 1846, plaintiff exposed to sale by auction, goods, &c., upon certain conditions, &c.; among others, purchasers over 30l. six months' credit, by giving approved endorsed notes—mutual promises. Defendant purchased 48l. 18s. 9d. worth. Request to pay for same by giving note at six months. Breach—refusal, and that plaintiff had been deprived of benefit of note.

Second plea to first count, as to the sum of 161. 15s. 7d. in the first count being the residue of money in first count. That plaintiff exposed goods for sale as an auctioneer, and as the agent of one Lilly Sherbourne, who was the agent of one Rudolph DeFleur, to whom the goods belonged, and as such agent of DeFleur delivered them to plaintiff to be sold as aforesaid. And the defendant further saith, that the said DeFleur was at the time of said sale indebted to defendant in 161. 15s. 10d., for goods sold, money lent, &c.; which said sum of 161. 15s. 10d. was equal to the damages sustained by plaintiff, by reason of the non-performance of the said promise in first count, in respect of said sum of 16l. 15s. 10d.; and defendant was ready to set-off, &c.

Demurrer. That plea was a plea of set-of against a special contract—for which unliquidated damages were sought to be recovered for the breach thereof. That if pleadable at all in this form of action, it could only be pleaded to an action commenced after the six months had expire. Whereas this action was commenced before the end of the six months, as appeared by the date of the said declaration, 14th April, 1847, and the day laid in the declaration, 27th October, 1846, upon which the contract was made. That defendant was alleged to be an auctioneer, and the agent of one Lilly Sherburne, who was the agent of one Rudolph DeFluer, without any allegation that the plaintiff had notice of the agency of Lilly Sherburne, or of the debt due by said DeFleur to the defendant, before the time of making the contract. That it was attempted to raise an immaterial and irrelevant issue that the goods were DeFleur's.

J. C. Morrison, for the demurrer.

The plea of set-off—assuming that the facts upon which it is founded would make it a good defence to this action—is bad, as being inadmissible in answer to the cause of action specially assigned in the declaration. A set-off cannot be pleaded to a claim for unliquidated damages, such as this is. If the plaintiff had declared against the defendant upon the common count, or had added to his special count a common count, the defendant then might have availed himself of this plea; but as the plaintiff has confined his claim entirely to the special count, a set-off is clearly excluded.—3 Camp. 329; 1 Esp. C. 378; 3 B. & Ad. 584; 3 M. & P. 525; 4 B. & Ad. 628; 1 H. Bl. 81; 7 Taunt. 257; 5 B. & Al. 333.

But supposing the plea of set-off to be good, so far as the declaration is concerned, still it is contended that the case, in its facts, does not admit of a set-off of a debt due by De Fleur. If the defendant had intended, when he made the purchase at the auction, to buy the goods as the goods of De Fleur, and to set off a claim he had against him, and to pay the plaintiff (the auctioneer) the balance, he should have made the auctioneer aware of his intention at the time, so that the opportunity might be given him either to protect himself if he had a lien, or Mrs. Sherburne, if the goods belonged to her, from the effect of the defendant's set-off. Had the goods been delivered by the plaintiff, after this intimation of the defendant's intention to treat the goods as De Fleur's and to claim his set-off, the plea perhaps would have been good—but without such an allegation in the plea, it is submitted, it must be held bad.

J. Lukin Robinson, contra.

The plea is good upon both the objections that have been taken.

It is true that a set-off cannot be pleaded to an action for unliquidated damages, such as the present form of action unquestionably is; but that general principle has this exception—that if the plaintiff has declared specially when he might have declared in indebitatus assumpsit, the defendant shall not lose the benefit of his set-off. Now it is contended, that in this case it was open to the plaintiff to have declared on the common count for goods sold and delivered, instead of adopting, as he has done, the more special mode of declaring.

He certainly could have so declared, if the six months' credit upon which the defendant purchased, had expired before the action was brought. But although the six months had not expired, yet it is contended that the credit had—for the refusal "to give an approved indorsed note" when requested, put an end to the credit—that being the condition upon which the credit was to be given—and made the purchaser, from the time of refusal, a purchaser for cash, and one who could consequently be sued on the common count for goods sold and delivered; and as he could then be sued in a form of declaration which would admit of a set-off as a defence, the plea will be good, notwithstanding the declaration happens to be special, instead of in the indebitatus assumpsit.—4 Camp. 385; 1 Stark, C. 410.

If then the plea of set-off is admissible in answer to this declaration, it will also, it is contended, be found to contain a sufficient defence to the action.

The defendant could not, it is admitted, by treating the goods as De Fleur's, and pleading his set-off, deprived the plaintiff of his lien as auctioneer; but it is contended, that this is not the effect of the plea, unless the plaintiff, by his own answer to the plea, chooses to give it that effect. If the plaintiff had had a lien, he could have replied that he had, and the defendant would have been driven to take issue upon that fact. The plaintiff therefore can find no fault with the plea, as depriving him of his lien. If he has lost it, he suffers, not from the plea, but from his own demurrer. But if he had in fact no lien, which is not unlikely, what difference can it make to him whether Mrs. Sherburne or De Fleur was the owner of the goods? If, however, it was material either to the plaintiff or to Mrs. Sherburne to deny the ownership of the goods as stated in the plea, the plaintiff could easily have done so—but

demurring—and therefore conceding that De Fleur was the owner of the goods—why should not the defendant have his set-off against him? The rule of law upon which the defendant is entitled to set off any claim he may have against a principal, when an agent of that principal who has an interest in the contract is suing him, seems to be clearly analogous to this case.—2 Chitty Rep. 387; 7 Taunt. 243. Why should the mere fact of there being a second agent, in the character of an auctioneer, engaged in the transaction, make any difference?

The plea then being applicable to the declaration, and in its facts a defence to the action, the demurrer, it is submitted, cannot prevail.

ROBINSON, C. J.—Considering that the plaintiff sues here in one count only, which is special, for the non-performance of an agreement to deliver to the plaintiff at a certain time a promissory note for a certain sum with a good endorser, and that he claims special damage for non-performance of that agreement, 1 am of opinion that the plea of set-off is inadmissible.

If the plaintiff had sued on the common counts also, and if the case had in its facts admitted of a set-off of a debt due by De Fleur, then the case of Hutchinson v. Reid, 3 Campb. 329, would have supported the plea.

But the declaration being as it is, it appears to me that the decision of the court in Hardcastle v. Netherwood, 5 B. & Ald. 93, as well as the very terms of the Statute of Set-off, prevent the defendant from pleading the set-off. Neither is it clear, I think, that upon the facts pleaded, the defendant could have been allowed to set off a debt due to him by De Fleur, even if this plaintiff had declared in the common form as for goods sold and delivered. It seems necessary that in such a case it should be shewn, that the auctioneer sold the goods to the defendant as the goods of De Fleur, so that when the defendant bought them he might have been warranted in supposing, that he could set off the debt against the sum bid by him

Jarvis v. Chapple, 2 Chit. R. 387, seems to import that, though it is not a satisfactory account of what was decided. The cases of Coppin v. Walker, 7 Taunt. 237; Coppin v. Craig, 7 Taunt. 243, appear to me to lead also to that conclusion.

Now here it does not appear on the face of this plea, that the plaintiff had himself any knowledge that any one but Lilly Sherburne had an interest in the goods; and if he sold them by her desire and as her goods, he was of course accountable to her.

Lilly Sherburne may, for all that we can see, have acquired from De Fleur a right to sell these goods as her own, and receive the proceeds for money due to herself in account. It is not stated that the plaintiff knew anything of De Fleur in the transaction; and probably the defendant could not have stated that in his plea with truth, and therefore did not plead it.

For all that is shewn by the record the fact may be, that when the plaintiff sold these goods he may have sold them either as his own, or as the goods of Lilly Sherburne, supposing them to be so; he may have known nothing whatever of De Fleur's interest in them at the time of the sale, and the defendant as purchaser may have bid for them and bought them as the goods of the plaintiff, or of Lilly Sherburne, giving no intimation of any intention to pay for them by setting off a debt due by De Fleur, until after he had got the goods into his own possession. Under

such circumstances, and we can presume no other, I take it to be clear, that the purchaser, even if the form of the declaration admitted it, could not defeat the plaintiff's recovery by advancing a set-off of a debt due by De Fleur. No authority has been shewn that would support it, and I take the law to be against the defendant.

It is further objected as a cause of demurrer, that before the six months had expired, the plaintiff was in no condition to sue for the price of the goods, as for a debt due to him; but could only sue, as he has done, for non-performance of a special agreement to pay, by giving an improved indorsed note. It is unnecessary to discuss that point in the case, if it be, as I think it is, a sufficient objection to the defendant's set-off, that the action, as the plaintiff has laid it, is one in which a set-off cannot be pleaded, and if, besides that, the circumstances under which the defendant made the purchase (so far as they appear) would not enable him to set off a debt due by De Fleur, even if the plaintiff had sued for goods sold and delivered in the common form.

I will only, therefore, say upon it, that at present I do not take this to be a case of the same description as that of Mussen v. Price, 4 E. 147, and Dutton v. Solomonson, 3 B. & P. 582. If it were, then undoubtedly the objection would hold, because I consider that the law is settled by those decisions, although Lord Ellenborough, in the one case, and Lord Alvanley in the other, very reluctantly concurred in them, feeling that it would have been more reasonable to hold, even under the circumstances of such contracts as those, that when the purchaser refused to accept the bill, or to make the note as he had agreed to do, it should follow as a consequence, that the vendor was in a condition to sue at once for the price of the goods.

The conditions of sale set out here being, that the purchaser was to pay cash for purchases under a certain amount, and was to have credit on purchases above that amount, giving approved indersed notes, I look upon it, that the person buying under those conditions, does not engage positively to produce notes with approved indersers, (as he certainly does engage, in the class of cases to which I have referred, to pay for the goods by accepting a bill or by giving a note,) but that he is only assured that he can have credit on condition that he furnishes the note.

The principle of Lord Ellenborough's decision in Nixon v. Jepson, 2 Stark. 227, applies, I think, to such a case as the present.

MACAULAY, J.—It appears to me clear that, as stated, this was not a sale simply on condition, that if defendant gave a promissory note he should have six months' credit, otherwise be bound to pay in cash, but a sale upon a six months' credit, the defendant undertaking to give a promissory note—or a sale of goods to be paid for, not in money on request, but by a promissory note at six months.—Mussen v. Price, 4 E. 147; Dutton v. Solomonson, 3 B. & P. 582. Hoskins v. Duperoy, 9 East. 498; where it was expressly agreed, that the price of the goods sold should be paid in a present bill of exchange, payable in two months from the sale and delivery of the goods; Lord Ellenborough says, it is now settled by Musson v. Price, and Dutton v. Solomonson, that where goods are sold upon a certain credit, to be paid for by a bill payable at a future day, the vendor cannot maintain an action for goods sold, until the time is arrived at which the bill would become due, because by the contract the goods are not to be

paid for till that time; but when it arrives, an action for goods sold and delivered may be brought, the contract being then no longer executory.—See Brooke v. White, 1 New Rep. 330; where Chambers, J., said, the qualifications respecting the mode of payment are introduced for the benefit of the purchaser, and during the time to which they relate, the seller must sue on a special contract.

Forster v. Surtees, 12 East. 611; Nickson v. Jepson, 2 Stark. N. P. 227. These two cases bear analogy to each other, but do not seem to me to be in point so much as those previously mentioned. I think the distinction obvious. In the former the goods were sold upon a credit which had not expired; in the last case the credit had expired, and there was no distinct undertaking in the original contract to extend it; it was only conditional at the option of the defendant if desired.

In the case before us, the only question really is, whether the goods as respected payment in cash) were sold and delivered on a credit or not? And it seems to me that they could not have been bought under and subject to the conditions of sale, and been delivered and accepted on those terms, if there was no credit given.

If defendant did not agree to furnish a promissory note at six months, but if in default thereof the plaintiff was at liberty and at once entitled to sue for goods sold and delivered payable on request, he could have declined delivery without receiving the note, or if refused, he could before delivery have sued the defendant for not giving it according to his contract; for the moment the defendant became a purchaser, exceeding 30% on the terms specified in the conditions of sale, they ceased to be conditions, but resolved themselves into a mutual contract binding on both sides.

Lee v. Risdon, 3 Camp. 329; 2 Mar. 495; 7 Taunt. 191; the point was raised, but either not considered or summarily overruled. Gibbs, C. J., seems to have treated the refusal of the vendee to accept a bill after delivery of the goods, as repudiating the special terms of the sale as to credit. To give such an effect to the present case, would be to enable a party, by breaking his contract, to acquire a right to bring in a set-off that he could not otherwise have done. Even if plaintiff might sue for goods sold and delivered, whereby he would evince his election to have rescinded the special agreement as to credit as well as defendant, he was not bound to do so, but might treat it as still executory, and adhere and hold defendant to it; so that no set-off could be let in till the time of credit had expired. When if admissible in an action for goods sold and delivered, it would be equally so in an action on the note, as against defendant, though perhaps not by his indorsers.—See Ross, Vendors, 59, (note y), as to the above case. - Day v. Picton, 10 B. & C. 120. Helps v. Winterbottom, 2 B. & Ad. 431, seems inconsistent with 2 Star. 227; so is Price v. Nixon, 5 Taunt. 338, also.

The only question really is, whether the goods were sold and bought upon credit or not? Now if they were to be paid for by note at six months, it shews they were, as to payment in cash, sold at six months' credit. Or, as said by Park, J., in 2 B. & Ad. 432, the contract substantially is for so many months' credit, to be paid at the end of that time in cash, but security to be given in the meantime, by the delivery of a bill or note at a certain stipulated period. And see what Littledale, J., says in the same case.

Now the word "giving," in conditions of sale, does not import a gift, but "paying," and if so read, the terms would be six months credit, "paying" approved indorsed notes; and taking either word, giving or paying, it imports that the buyer is to be bound to furnish such notes, and the seller to accept them.

I have always understood the terms or conditions declared at auctions to be promulgated with such views—to be hypothetical, as it were, until some one buys; but then in relation to that transaction of sale and purchase, not a condition of sale, so much as the terms thereof, and as constituting an express contract between the auctioneer and his vendee, and binding upon both parties.

Would it be doubted, were a merchant to offer to sell goods to A. B. at six months' credit, he giving or paying by promissory note at six months, and A. B. purchasing goods on these terms, that he did not buy at six months' credit, or that the vendee could not sue for non-performance of the agreement, should the note be refused; or that it would, to such an action, be a sufficient defence to plead, that the plaintiff might have sued for goods sold and delivered, and that defendant had a set-off to the amount? I apprehend not.

Whether in such special action, as suggested by Littledale, J., in 2 B. & Ad. 432, the plaintiff would be entitled to recover the full price of the goods, or only damages for breach of contract by the vendee for not giving the note, might be a question; but clearly, in my humble judgment, the plaintiff, before the time of credit has expired, may sue specially, and defendant cannot set off a demand against the owner of the goods as a defence to the action. To support the defendant's argument, it must be looked upon, not as a condition at all, but as a mere discretionary right, of election, in effect like the facts in the case 2 Stark. N. P. C. 227; and that, therefore, as the defendant, on delivering a receipt of the goods, did not at once furnish a promissory note, an implied promise to pay in cash forthwith arose.

This view I have not been able to take of the case, as set forth in this declaration, to which, of course, my attention is confined.

Jones, J.—The goods were sold at an auction by the plaintiff. The conditions of sale, as stated in the declaration, were, that the highest bidder should be the purchaser; that purchasers to an amount under the sum of 15t. should pay the same in cash on delivery; purchasers to any amount from 15t. to 30t. three months' credit, and purchasers over 30t. six months' credit, giving approved endorsed notes.

The question is, whether, for purchasers over 30*l*, there was a credit given, or whether the goods were sold for cash, with a condition that credit should be given upon approved notes, to be furnished by the purchaser. Sales at auction are for cash, or upon a credit. When upon a credit they are so advertised, and the terms mentioned, which are similar to those stated in this case. Cash to be paid for small purchases, and a credit, to an extent proportioned to the amount of purchase by each individual, upon giving notes to the satisfaction of the vendor. Whether for cash or upon credit, the auctioneer is not bound to deliver the goods till the purchaser performs his part of the contract; that is, till the cash is paid, if within the sum for which cash was to be paid, or till approved notes are given for those sold on credit.

But if, in either case, he does not deliver them without at the same time receiving the cash or the approved notes, he can, in the former case, sue immediately for goods sold and delivered; and, in the latter, the purchaser can only sue for goods sold and delivered after the credit expired, or immediately, I think, on the contract to furnish approved notes.

I consider the contract, as stated, to be, on the part of the auctioneer, to deliver the goods to the highest bidder upon payment of the money or giving the notes according to the amount; and on the part of the purchaser, to take the goods, paying cash or furnishing approved notes, as the case may be. I cannot regard the transaction as a cash sale, with a condition that the credit shall be given upon furnishing approved notes.

It appears to me, that the auctioneer contracts to deliver the goods to the highest bidder, and the purchaser contracts to take the goods, paying cash or furnishing notes as the case may be.

The auctioneer is not bound to deliver the goods till the cash is paid or notes delivered, nor is the purchaser bound to pay the cash or give the notes till the goods are delivered. The acts are concurrent, but if either fails an action lies.

I consider the goods purchased in this case to be paid for by an approved note at six months, just as they were bought in Dutton v. Solomonson, 3 B. & P. 582, to be paid for by a bill at two months; and that that case decides the question in this—giving promissory notes or paying in notes I hold to be the same. The words would both, used here, express the same meaning, they would be synonymous; and I am sure there could be no doubt in the matter, if the word "paying" had been used instead of "giving."

A set-off is only allowed in actions of assumpsit, debt, and covenant for the non-payment of money, and for which an action of debt or indebitatus assumpsit might be maintained. The case of Hutchinson v. Reid, 3 Camp. 329, is a case like the present. It was for not accepting a bill for the price of three puncheons of rum, sold by the plaintiff to the defendant on the 2nd December, 1812, to be paid by bill at two months. The action was commenced before the expiration of the two months. Lord Ellenborough held a set-off inadmissible, but thought it would have been admissible if the action had been instituted after the expiration of the credit. He says, that at the commencement of the action no debt was due the plaintiff. The action was not brought for a debt, but for refusal to do a collateral act.

This is an express authority in point to shew that the plea of set-off is bad. If the action had been brought after the expiration of the credit, the defendant, I think, would have been entitled to his set-off—2 Chitty Rep. 387—except that defendant would not be allowed to defeat the plaintiff's lien.

If an auctioneer sells goods as his own, or has a lieu upon them, the set-off dould not defeat his action—2 Chitty Rep. 387; without lien, set-off good—7 T. R. 359. When a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear, and bring an action upon that contract against the purchaser of the goods,

yet the purchaser may set off any claim he may have against the factor in answer to the demand of the principal—7 T. R. 360, note.

If a purchase is made in the name of an agent and deposit made, an action may be brought in the name of the principal for each deposit, when the matter falls through, although the name of the principal was not known till after the deposit and receipt in the name of the agent.—
1 Camp. 329.

When the contract is made in the name of the agent without disclosing the principal, the defendant is let into all the equities he could have had, if the action had been brought in the name of the agent. —7 T. R. 359.

It has been settled in many cases, that a principal, when disclosed, may step in and exercise his own rights—Lord Ellenborough, in Bickerton v. Burrell, 5 M. & S. 388—but the disclosure of the name of the principal must be made before action brought in his name. Abbott, J., in same case, an agent can bring no action in his own name when he contracts as agent. Holroyd, J., same case—if an agent contracts by deed personally he alone can sue upon it.

A party dealing with an agent as principal, can acquire no right of set-off against the actual principal, if he had notice that he was dealing with an agent.—2 C. & P. 350.

An auctioneer employed to sell the goods of another may sue in his own name, although the goods were known to be the property of such other person.—Williams v. Millington, 1 H. B. 81.

Where an agent sues on a contract, by right of having an interest therein or otherwise, the defendant is at liberty to set off any claim he may have against the principal (except contract under seal).—Jarvis v. Chapple, 2 Ch. 387. When goods delivered without payment, defendant, in an action by auctioneer, may set off if a debt due him from owner.—7 Taunt. 243.

MCLEAN, J., concurred with MACAULAY, J., in thinking the plea bad, for the reason he assigned.

Draper, J., being in the Practice Court during the argument, gave $n\boldsymbol{o}$ judgment.

Per Cur. - Judgment for the plaintiff on the demurrer.

DOE EX DEM McDonald V. TWIGG AND WOODSIDE.

Under our act, 59 Geo. III., ch. 3, a deed executed by husband and wife, but without an examination of the wife and a certificate thereof, is void: so that notwithstanding the deed, the husband may maintain ejectment during the coverture.

Semble, however, that under the more recent act, 1 Wm. IV. ch. 2, the grantee's possession cannot be disturbed during the lifetime of the husband.

Semble, that care should be taken that the deed expressly convey the interest of th husband; for if the deed merely shews, that he joins for conformity, and to manifest his assent to his wife's parting with her estate, his interest will not pass.

A., B. & C. are witnesses to a deed; A. having been shewn to be dead, his handwriting is proved; the handwriting of B., who is also the lessor of the plaintiff in the action of ejectment, is also proved. D., the defendant in the action of ejectment, having proved B.'s handwriting, rests his proof of the deed there, without attempting to account in any way for C., the third witness.

Semble, per Jones, J., that the deed, without accounting for the absence of the witness, C, was not legally proved.

(The rest of the court expressed no opinion on the proof of the deed, considering it void upon the other objection.)

Catherine McDonald, the patentee of the land, being a married woman, executed a deed, jointly with her husband, conveying the land in question (100 acres in Manvers) to one Gregory, from whom the defendant purchased.

Large improvements had been made on the land by the defendants, and the property was said to be now worth about 500l.

This deed was made in 1828; it was attested by John McDonald, the present lessor of the plaintiff, who is a brother to Catherine McDonald, and who knew that his sister and her husband obtained land in the Eastern District, where they resided, in exchange.

The deed to Gregory being made in 1828, it was necessary that the patentee, being a married woman, should be examined, and a certificate be obtained to the deed being her free and voluntary act, as directed by the statute 59 Geo. III. ch. 3, which was the law at that time in force respecting deeds by femmes couvertes.

This was never done, and in 1838 the present lessor of the plaintiff took a deed from Catherine McDonald, and her husband, of the 100 acres in Manvers, paying her, as he states, 60% for it; his excuse for his conduct being, that the title for the land which his sister received from Gregory in exchange, is deficient, though the defect is not pointed out, and though his sister and her husband are still in possession of that land.

The defendants, claiming under the first deed, made to Gregory, endeavoured to make title under it. But in the first place they had difficulty in proving its execution.

There were three subscribing witnesses to it; one of them was shewn to be dead, and they proved his handwriting. Another of them was John McDonald, the present lessor of the plaintiff, who, notwithstanding his knowledge of this first deed made by his sister, now claimed under the second; his handwriting was proved, and further clear proof of admissions made by him, of the execution of that deed by the grantor, was given at the trial. But there had been no diligence used in tracing the third subscribing witness, and he was not accounted for; the defendants had not even inquired who the person was, and had made no attempt to trace him.

The first question at the trial was, whether under these circumstances the deed could be read in evidence. It was contended that it might be, as against this lessor of the plaintiff, on account of his being himself an attesting witness to it, and thereby declaring its authenticity, and having besides explicitly acknowledged that it was executed.

This deed was allowed to be read, subject to the legal question of the necessity of accounting for the third subscribing witness.

The only advantage which the defendants could receive from establishing the execution of the deed to Gregory, might be, that it would at all events shew the estate divested, so far as regarded the husband's interest during the coverture, and thus prevent the recovery in this action.

The defendants contended, that although the deed, for want of the examination and certificate, could not operate to pass the estate of the wife, that it would yet have the effect of divesting the husband of his interest, and so enable them to hold during the coverture at all events.

Whether there was issuing of the marriage, so that he could be tenant by the courtesy, did not appear.

A verdict was taken, subject to points reserved.

P. M. Vankoughnet, for the lessor of the plaintiff.

The deed attempted to be proved by the defendant, cannot be given in evidence, for two reasons. In the first place, there is no legal proof of its execution. It was clearly not sufficient, to prove the handwriting of the lessor of the plaintiff, and stop there, without assigning any reason for not calling the third witness, McDonell. He might possibly have proved the deed an escrow if he had been examined.—2 E. 183. And in the second place, the deed, even if duly proved, is void, under the express wording of the statute, 59 Geo. III, ch. 3, it not appearing upon the deed that the wife, to whom the estate belonged, was duly examined.

Sullivan, Q. C. for the defendant.

The objection of the learned counsel to the due execution of the deed might have been good, if the witnesses to the deed had all of them been indifferent parties; but as the lessor of the plaintiff was himself one of the witnesses, and as his handwriting was proved, the authenticity of the deed as against himself was sufficiently declared.

With respect to the second objection, the case of Doe dem. Connor v. Collyer Mich. Term. 1888, seems to be in point. It was there held, that the deed would enure to the benefit of the grantee during the coverture. It is true that was a decision under the act, I Wm. IV. ch. 2, but the words of that act are almost as strong as the 59 Geo. III. ch. 3. There has been no decision of the court under the older act, and it is hoped that that the decision given under the more recent act may be held to apply to this case, as otherwise very gross injustice will have been committed against these defendants.

ROBINSON, C. J.—In Doe dem, Connor v. Collyer, decided in this court in Michaelmas Term, 1838, such effect was given to a deed executed by a married woman and her husband, when there had been no examination of the wife, and the husband, was held disabled from maintaining ejectment during the coverture; that deed was executed in July, 1834, and so came under the statute I Wm. IV. ch. 2, which declares "that the deed shall not be valid or have any effect, unless," &c.

But the 59 Geo. III. ch. 3; under which the deed now in question comes, was more particular, and provided "that nothing in such deed should have any force or effect, to bar such married woman, or her said husband, or her heirs, during the continuance of her coverture, or after the dissolution thereof, or shall be held to have any force or effect whatever," unless, &c.

I am not aware that we have in any case held, that a deed executed while this statute was in force could, notwithstanding the very express language of the statute so far have effect, as to avail the husband during coverture, though there is room perhaps to contend, that the legislature only meant to deny to the deed of the wife so executed, any effect either during or after coverture, but not to deny to the deed of the husband, if the conveyance should contain apt words to pass his interest, the effect of binding his interest, inasmuch as no examination could be required for that purpose; it must be always in his power by his deed, executed either separately or jointly with his wife, to divest himself of his interest.

It seems to have been thought in the case of Doe dem. Connor v. Collyer, that it was reasonable to give such effect to the deed, and that there was nothing in the general words used in I Will. IV. ch. 2, to prevent it, while there were, as I suppose there were in that case, apt words in the deed to pass all the husband's estate and interest.

But in the case before us, the difficulties are much greater; for there are not only the more particular negative provisions, which the statute applicable to this deed contains, but the deed itself appears to be unusually bare of any words expressly conveying or apparently intended to convey the husband's interest. It is emphatically a deed in which the husband seems to have joined merely for conformity, and to manifest his assent in his wife parting with her estate, and it comes therefore under the principles laid down in Beckwith's case, 2 Co. 57, and in Lord Cromwell's case, 2 Co. 77; and where it is held, that when the husband and wife join in a fine to pass the wife's estate, the intent being that all the estate shall pass from the wife, and the husband joining only from necessity and for conformity, then if by reason of the nonage of the wife, the fine does not bar her, then the law shall permit the truth to be shewn and the wife shall not be prejudiced by any interest passing even during the coverture, but the assurance shall be wholly void.—Worsley, s case, Cro. El. 159; I Roll. 74.

I consider that we cannot hold anything to have passed by the first deed, and this being so, it is quite unnecessary to determine whether that deed was sufficiently proved at the trial, since it cannot avail the defendants for any purpose.

The plaintiff is entitled to postea.

Jones J.—I do not think that due enquiries were made to find out what Alexander McDonald was the subscribing witness to the deed, or where he was.

The deed is dated in the township of Cornwall, where the parties or some of them resided, and where there are several persons of the same name as the witness.

Enquiries should have been made there, where it is probable his hand-writing would have been recognized, and the identity of the witness thus ascertained, as he apparently writes a good hand. If upon such inquiries, no information could have been procured, the proof respecting the other subscribing witnesses would have been sufficient to establish the execution of the deed.—2 East. 183.

I do not think the mere fact of proving a plaintiff's handwriting as one of the witnesses, should be considered as sufficient without accounting for the others; it is to be regarded like an admission of a party that he executed a deed, which is not sufficient; a subscribing witness must be produced, or all the witnesses accounted for, and the handwriting of one proved.

But where, as in this case, a party attests the execution of a deed of land, and afterwards, supposing the deed to be ineffectual to convey the land to the grantor, himself becomes a purchaser and takes a conveyance of the same land, proof of his handwriting should of itself be considered as sufficient evidence of the execution.

There seems to be a distinction in the proof required to establish the execution of a deed, in a case where the witness was interested at the

time of the attestation, and at the trial, or when he became interested after the attestation and continues so at the trial. In the former case the witness would not be examined himself, nor would proof of his handwriting be sufficient; the handwriting of the party to the deed must be proved; in the latter, proof of the handwriting of the interested witness would be sufficient.—Squire v. Bell et al., 5 T. R. 371; and by this case, it appears that the attestation of a witness, interested at the time of the attestation, and at the trial, is a mere nullity, and the deed must be proved in the same manner as if his name did not appear.

Cunliffe v. Sefton et al., 2 E. 183, is an authority to shew that in this case, sufficient enquiry was not made for the subscribing witness Alexander McDonald, and the arguments of counsel and the opinions of the judges in that case, seem to establish that the proof of the handwriting of the plaintiff, the interested witness in this case, would not have been regarded as sufficient proof of the execution of the deed, but that all the attesting witnesses should be accounted for; and in my opinion, due diligence was not used, to ascertain who and where the subscribing witness Alexander McDonald was. The deed to Gregory was not legally proved, and the plaintiff was entitled to a verdict.

MACAULAY, J., and McLean, J., concurred in granting the postea to the plaintiff.

Per Cur.—Postea to the lessor of the plaintiff.

Doe dem. Arnold et al. v. Auldjo.

Ejectment.—At the trial the plaintiffs put in evidence an exemplification of a patent, dated 10th March, 1797, granting these lots in fee to Francis Crooks. It was then proved that Francis Crooks married in this province in 1794, and had two daughters—that one of the lessors was one of these daughters—the other lessor was a son of the other daughter—that Francis Crooks left this province for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and was at the time and when heard from at New York, in a very precarious state of health, on which account he had gone away; and it was heard in the following spring that he died in the West Indies—and it was so understood and believed in his family ever since. The defence was, that he died before the 10th March, 1797; and therefore that the patent to him dated on that day was void, and that a second patent issued in consequence thereof. And a patent, dated in 1801, granting these same lands to Abraham Auldjo in fee, was put in. It was next offered by defendant to prove a petition from the widow of Francis Crooks to the Court of Probate, praying for leters of administration, and stating the day of his death, as evidence of his death on that day. The learned judge rejected The letters of administration were put in. It was next proposed to put in a petition, signed by some members of the family of Francis Crooks, to the executive government, praying that a new patent might issue in consequence of Francis Crooks' death before the 10th March, 1797, as a declaration of that fact by relatives of the family. It does not appear who were the parties signing it. The learned judge rejected that also. The defendant then offered in evidence the memorial of Abraham Auldjo, praying that the new patent might issue to him, alleging that the patent of the 10th March, 1797, was issued subsequently to the death of Francis Crooks, and asking the grant for the benefit of Francis Crooks's creditors, of whom Abraham Auldjo was one, with consent of Francis Crooks's administratrix. This was also rejected by the learned judge. The defendant then called as a witness a surviving brother of Francis Crooks, who proved that the latter left this province in very had health in the fall of 1706, being in fact considered in a province in very bad health in the fall of 1796, being in fact considered in a desperate condition—that he wrote from New York, stating that he was

better, and intended proceeding to the West Indies—and that in the following spring the witness was informed of his death. The learned judge refused evidence of the day on which (as the witness heard) his death took place—or to receive evidence of the family reputation of the day of his death—or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been the servant of Francis Crooks—or to prove the contents of certain papers (since lost) which the witness received from the servant, and alleged to be an inventory made of Francis Crooks's effects at the time of his death, and an account of the sale of his effects after his death. And upon the evidence admitted, it was left to the jury to say, whether Francis Crooks died before or after the 10th March, 1797. If before, to find for the defendant—if after, for the plaintiffs. The jury gave a verdict for the plaintiffs. Held, per Cur., (Robinson, C. J., dissentients)—on motion for a new trial without costs, on the ground of misdirection and rejection of evidence—that the evidence rejected by the learned judge (Jones) at the trial was inadmissible; but that, as the nature and character of some parts of the evidence rejected were not known with sufficient certainty, the Court would grant a new trial on payment of costs.

The Chief Justice was also of opinion—that even after the whole of the evidence objected to had been disallowed—the jury would have exercised a sound discretion in finding for the defendant upon the evidence which

had been admitted.

Ejectment for lots Nos. 16, 17, 18, and 19, 5th concession, and 18 and 19, 6th concession of Windham. At the trial at the last fall assizes for Niagara, for the plaintiffs was put in an exemplification of a patent, dated 10th March, 1797, granting these lots in fee to Francis Crooks. It was then proved that Francis Crooks married in this province in 1794, and had two daughters; that one of the lessors was one of the lessrs was one of these daughters, the other lessor was a son of the other daughter; that Francis Crooks left this province for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and was at the time, and when heard from at New York, in a very precarious state of health, on which account he had gone away; and it was heard in the following spring that he died in the West Indies; and it was so understood and believed in his family ever since. The defence was, that he died before the 10th March, 1797, and therefore that the patent to him, dated on that day, was void, and that a second patent issued in consequence thereof. And a patent, dated in 1801, granting these same lands to Abraham Auldjo in fee was put in. It was nuxt offered by defendant, to prove a petition from the widow of Francis Crooks to the Court of Probate. praying for letters of alministration and stating the day of his death, as evidence of his death on that day. The learned judge rejected it. The letters of administration were put in. It was next proposed to put in a petition, signed by some members of the family of Francis Crooks, to the executive government, praying that a new patent might issue, in consequence of Francis Crooks's death, before 10th March, 1797, as a declaration of that fact by relatives of the family. It does not appear who were the parties signing it. The learned judge rejected that also. The defendant then offered in evidence the memorial of Abraham Auldjo, praying that the new patent might issue to him, alleging that the patent of 10th March, 1797, was issued subsequently to the death of Francis Crooks, and asking the grant for the benefit of Francis Crooks's creditors, of whom Abraham Auldjo was one, with consent of Francis Crooks's administratrix-Vide 4 B. & Al. 433. This was also rejected by the learned judge. The defendant then called as a witness, a surviving brother of Francis Crooks, who proved that the latter left this province in very bad health in the fall of 1796, being in fact considered in a desperate condition; that he wrote from New York, stating that he was better, and intended proceeding to the West Indies; and that in the following spring the witness was informed of his death. The learned judge refused evidence of the day on which, as the witness heard, his death took place, or to receive evidence of the family reputation of the day of his death; or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been the servant of Francis Crooks; or to prove the contents of certain papers (since lost), which the witness received from this servant, and alleged to be an inventory made of Francis Crooks's effects at the time of his death, and an account of the sale of his effects after his death. And upon the evidence admitted, it was left to the jury to say, whether Francis Crooks died before or after the 10th March, 1797. If before, to find for defendant; if after, for plaintiffs. The jury gave a verdict for the plaintiffs.

Sullivan, Q. C., obtained a rule for a new trial, for the rejection of evidence, and on the evidence, and for misdirection; he cited 3 B. & C. 570; 5 Ves, 458; 4 B. & Al. 433; 6 Ves. 512; 2 Swans. 235; Buller's N. P. 294; 4 C. & P. 375; 7 E. R. 279; 15 E. R. 35.

Cameron, Sol. Gen., shewed cause, and cited Phillips on Ev. 227: Roscoe N P. 30; 2 R. & M. 167; T. Ray. 84.

The argument of Sullivan. Q. C., fully appears in the judgment of Draper, J.; and the argument of Cameron, Sol. Gen., in the judgment of the Chief Justice.

ROBINSON, C. J.—The learned judge, though he rejected some of the evidence by which the defendant sought to establish the fact of the death of Mr. Francis Crooks, before March, 1797, did not, as I apprehend, by any means give the jury to understand, that without such evidence the conclusion which they must come to, should be in favour of the plaintift's claim under that patent.

I confess it appears to me, that, setting aside all the evidence that was rejected, the jury did not exercise a sound judgment in holding that patent to have been issued in Francis Crooks's lifetime. Enough did appear at the trial to shew, that his nearest connexions did conclude him to be dead before 10th March, 1797. The admininistration granted in 1797, was received in evidence, and the very fact of the crown having made the second patent to a creditor for the benefit of his estate, ought to have weighed most strongly, for it was done advisedly, not unintentionally and by error, unmindful of the former patent. Some respect is due to the decisions and acts of the government, made deliberately on a view of evidence before them, in a matter in which the crown has no interest—so much weight, I think, that the person holding an interest in accordance with their acts and decisions, should not be disturbed fifty years afterwards, upon a mere surmise that the government acted upon false or insufficient evidence, when in the whole lapse of time that has intervened, nothing is shewn to have transpired that throws the slightest shade of doubt upon the sufficiency of the foundation on which the government acted.

It is true, that we cannot say here, that it was actually proved upon the trial that the government issued the patent to the defendant's father as a creditor of the late Francis Crooks's estate, upon a circumstantial representation made at the time by his widow and kindred, that the first patent was void by reason of his death before it was completed; but it is necessary to consider that the defendant was prepared to shew this at the trial, as he stated, and desired to do so, but the evidence was not admitted; with much deference to the learned judge, who is in general so accurate in his first impressions, I am of opinion that the evidence was properly receivable, though it was res inter alios acta. The government were disinterested in the matter; they were acting in a public matter within their sphere; and if it be really true, that the grounds on which they acted were furnished at the time by the mother and natural guardian of those who are now interested in setting up the contrary, surely the public act of the government, when so moved to it, should be held to furnish prima facie evidence of the fact that had been made appear to their satisfaction.

If these plaintiffs could shew the contrary, of course it is open to them to do so. In the meantime, if reputation of the fact of death, among the members of a man's family, be evidence, as it clearly is, the shewing what the defendant desired to shew on the trial, in regard to the application for the second patent, would be something much more precise and definite than the ordinary evidence of reputation; it would be the prevailing reputation, acted upon at a certain time, in a matter interesting to the family, and would seem to fix with more precision than usual, what is in general given upon much less satisfactory grounds.

If for instance, the memorial signed by the widow and nearest relatives of Francis Crooks, had shewn when produced, that they had soon after the time of his supposed death, stated as a notorious fact that he had died before the crown made the grant to him, and had in consequence made their request, which had been acceded to, that a valid patent should now issue to a principal creditor, in order that it might be made the means of satisfying certain debts of the intestate, surely it could never have seemed just, that a fact thus assumed upon their statement, and standing uncontradicted for fifty years, should now be treated as unascertained and doubtful, in order to vest in his heirs an estate of which we may suppose his family have already received the benefit, by its being taken in satisfaction of his debts; and when it cannot be doubted, that if the first patent had not been thus treated as invalid, the land would have been long ago sold in execution to satisfy those debts, for which all remedy would now be barred.

I think the evidence which I have just referred to, was admissible, under the circumstances of the case, as being more clear and satisfactory evidence than mere general rumour in a family, of a fact which is allowed to be proved by reputation, and offered too after a lapse of fifty years, when living witnesses are not expected to be produced, and when it is not reasonable to suppose, that the circumstances of the death of a mere stranger in a distant foreign land, could any longer be traced,

The rule of evidence, which requires in general the best testimony, and rejects that of secondary quality, is founded upon the suspicion, which it is prudent to entertain, when inferior evidence is offered, under circumstances which allow us to assume that there is better evidence in the power of the party, which it would not suit his purpose to produce. But here there is no room for that suspicion. If the evidence offered, had

been advanced for the purpose of establishing that Francis Crooks died on some one certain day, it might seem to militate more against a particular supposed rule of evidence, which has been relied on; but it was wanted here, not for establishing anything so precise, which mere reputation could seldom do satisfactorily, but for the purpose of supporting what had long been assumed to be the fact, that he was dead before a certain patent issued; not that he died on one day or another, precisely, but that, as a fact, he was understood by his family to be dead before a certain act intended for his benefit was done. I also think that it was competent to Mr. James Crooks to state in evidence at the trial, what account he received in 1797, from the servant of his deceased brother, when he returned to his place of residence with the papers of his master, and an account of the disposition of his effects.

The rules and principles of evidence are under the control of reason; the law does not exact what is impossible. We must suppose that the family of Francis Crooks, having no reason to doubt the truth of the melancholy narrative of the servant, would be satisfied with it and make no farther inquiry.-Ros. N. P. 30. I look upon the account given by the servant immediately on his return, of the fate of his master, as standing on the same footing with many declarations made by parties at the time of a transaction, which are looked upon as a part of the res jesta, as being facts of themselves. I do not know what other evidence we can reasonably expect to be given of it. Mr. Crooks left his home in desperate health, to seek a warmer climate, in the hope, so frequently vain, of prolonging life; there is therefore no improbability in the servant's relation, which seems to have been credited at the time, and ever since, and no more precise testimony to the contrary is offered in competition with it. If he were living, his viva voce evidence might be demanded, but after fifty years, parties are relieved from the necessity of attempting to account for him.-4 B. & Al. 433. In Roe dem. Brune v. Rawlings, 7 E. R. 290 Lord Ellenborough says, "there are several instances in the books, where "the declaration of a person, having knowledge of a fact, and no in-"terest to falsify it, has been admitted as evidence of it after his death. "Thus the written memorandum of a father, as to the time when his child "was born has been, received to prove when the infant would come of "age, and that he was under age at the time of making his will."—(Sir "T. Ray. 84.) "And yet the most that can be said for such evidence is, "the peculiar means of knowledge of the fact by the father, and the ab-"sence of all interest in him, at the time of the memorandum or declar-"ation made, to falsify the truth in respect to it."

If a gentleman had left this province on his travels in 1815, and his servant had returned with his papers and effects the following year, and reported that his master had joined some part of the army as a volunteer at the battle of Waterloo, and had been killed, and that he had seen him buried, I do not imagine that any better evidence of his death before 1816 would be required than this declaration, coupled with the fact that the servant was dead, and that the belief had always since prevailed in the family that this statement was true.

If the time of death of any one of the many African travellers, who have perished in attempting to explore that continent, became a question in any action connected with the succession to his property, I conceive

that no better evidence would be required than the account brought back by his faithful servant to his family, and accredited by them, and by the government which had employed him, as this report is stated to have been accredited by the government of this province. I mean, that such evidence could never be rejected, unless the servant were living and accessible.

Where the received opinion of the family is admissable in evidence, without shewing the foundation for it, it can surely not be illegal to allow the members of the family to state upon what facts and circumstances their opinion had been formed.

In Johnson v. Lawson et al., 2 Bing. 86, the question of receiving, in case of pedigree, evidence of declarations of deceased persons, who were not members of the family, but acquaintances or servants, is much discussed; and though the evidence of a declaration of an intimate acquaintance merely of the family, respecting the pedigree of the family, was in that case rejected, there is nothing said in the luminous judgment of the chief justice, which to my apprehension is inconsistent with the admission of the declaration of the servant, whom I assume to be now dead, of the facts attending his master's death, which has no more to do with any question of pedigree, than the entry of a deceased clerk or servant, of the delivery of goods, or other act done within the scope of his duty, which have in many cases been admitted under circumstances which rendered them admissible.—2 R. & M. 146, 167.

It is better evidence certainly, than the inscription on a mourning ring, or a tombstone, engraved by a stranger (as we may assume) by the verbal direction of some member of the family, of whose means of information we have no account whatever.

If it were clear, that no evidence was rejected at the trial which might have been received, I should still have thought it right, that this case should be submitted to the consideration of another jury, upon such evidence as was given to the last, before the defendant should be dispossessed of the land which the crown had granted to his ancestor fifty years ago. If Francis Crooks were not living on 10th March, 1797, then the title of the defendant is free from question. Of the fact of his death there is no doubt, nor that it occured in that year; and it was proved to the jury, that intelligence of his having died at St. Thomas in the West Indies, was received by his family in Niagara in this province, in the spring of that year. When we reflect how few and uncertain were the opportunities of communication between this province and the West Indies in the year 1797, and what time was commonly consumed at that period in coming from the Atlantic coast to Upper Canada, it need hardly be said, that if intelligence was received in Niagara in the spring, of the death of a person in one of the smallest and most remote islands of the West Indies, such death was most unlikely to have happened so late as on the 10th of

Without the aid of any positive account from the servant that had attended him, the probability that he died earlier in the year far outweighed the reason for coming to the opposite conclusion. A new trial, granted on this ground, however, could only have been on payment of costs. But if any material evidence was rejected, which should have been received, as I think was the case, the defendant is entitled to a new trial without costs.

When I said, that independently of all legal exceptions, the weight of evidence was in favour of the inference that Francis Crooks was not living on 10th March, 1797, I spoke, of course, with reference to the facts proved, and to what must be supposed to be known to all, as to probabilities resulting from those facts. It was material to the jury to consider, whether, if it was proved that the death of Mr. Francis Crooks in St. Thomas, was heard of in Niagara in the spring of 1797; it was not almost certain that it must have occurred before the 10th of March of that year. I have considered what the probability was. I findgin a file of the U. C. Gazette, which I have, this notice, published at Niagara, 26th of April, 1797: "Died, at St. Thomas, the 8th February last, Francis "Crooks, Esq., merchant, of this town, a gentleman much respected while "liviny, and his death is greatly lamented by his numerous relations, friends and acquaintances." The patent to him issued 10th March, 1797, which allows just forty-seven days for the intelligence from St. Thomas to reach Niagara, if he had died on the 11th March. Supposing that it was published at Niagara on the very day it arrived, the Gazette was only published once a week; St. Thomas is in about 18° N. latitude, and 65° W. longitude, 1200 miles more remote from New York than Havana is. It appears by the file of the Gazette, that it usually took about a month at that period to receive accounts from Philadelphia at Niagara.

DRAPER, J.—There are some parts of the evidence rejected that are, I think, clearly inadmissible from what is shewn; others, with regard to which, though I entertain a strong impression, I am not at present prepared to decide without further knowledge of the facts.

The memorial of Abraham Auldjo is not, I think, in any point of view receivable. He was stating a case for his own advantage—to further his own objects; and there can be no doubt, that no statement made with that intent can in itself furnish evidence of facts to sustain his case. His allegations in his own behalf, cannot be converted into evidence against the rights or claims of third parties.

Secondly. As to the petition to be signed by some members of the family of Francis Crooks, it is important to know who the petitioners were, in what interest and for what object they petitioned, and whether they or any of them are yet living. It is possible their statements may have been advanced with a view to their own immediate advantage or relief. It must be inferred from their becoming petitioners, that they had some object to attain, and were not simply offering proof of facts for the use of other parties. If the latter, the nature and character, as well as the object of their statement, when known, even if not for their own advantage, may fall within the objection, that they were made post litem motum, and so, though otherwise admissible as the declarations of members of a family, properly rejected in this case.

Thirdly. As to the statements made by the servant of Francis Crooks it does not appear whether he was known to be the servant, otherwise than by his own account. But if he were, as a general principle, the declarations of a servant, however trusted and trustworthy, or of a friend, however intimate or confidential, are not admissible in evidence even on questions of pedigree.—See Johnson v. Lawson, 9 J. B. Moore, 190, 2 Bing. 86; and Crease v. Barrett, 1 C. M. & R. 919. And if these statements can be received, it must be because they fall

within the principle of some exception to this general rule. At present, I confess, I do not see how they can be admitted in evidence; not (so far as I can perceive) as forming part of the res gestæ, which are the subject matter of enquiry; for the enquiry is at to an event that happened in the West Indies, and when it happened, and the statements of the servant, as I understood, accompanied some acts of his own, in the delivery of certain papers to Mr. Francis Crooks's brother, which took place some months after the event which is the subject matter of enquiry and in this province, all of which, as regards the lessors of the the plaintiff and the defendants, appears rather to be res inter alios acta.

Fourthly. As to the papers brought from the West Indies, I think, so far as appears, they were properly rejected. If any of them had been papers in the handwriting of Francis Crooks, or if any articles known to have belonged to him, and to have been in his possession when he left this province, had been brought, the fact and time of their receipt might be evidence to go to the jury, from which they might infer the time of death, or at least draw a conclusion whether Francis Crooks was living at the time of the issue of the first patent : as, for instancee, if his watch, or any other article known to belong to him, and to have been in his posession, had been delivered to a relation here, by a person with a statement that Francis Crooks was dead, and the time of delivery was such as to render it impossible that the party could have come from the West Indies since the date of the patent. But papers not otherwise authenticated or identified with Francis Crooks, than by the declaration of the person who brought them, or by what is stated in them, are not, I think, evidence, at least, for the purpose of proving on what particular day he died, if indeed for any purpose whatever.

Fifthly. As to the evidence of the brother of Mr. Crooks-admitting that family tradition or reputation is evidence of the time of the death of a member of that family, it is admitted on the footing that there is no other evidence beyond this tradition and reputation; in other words, that all that is known or can be traced is tradition and reputation. But I find no case deciding, that where the family reputation can be traced, home to its source, to some distinct fact or statement, that the evidence of the family reputation is to be substituted for the evidence of such fact, and that a jury are to be directed to find the fact, not because it is proved to them by sufficient evidence, but because the family adopted the belief. on a ground not sufficient for the jury, for all that is now made to appear; that is, that the jury should in this case be directed to find that Francis Crooks died on a named day, because his family adopted that conclusion on the declaration of a servant; though the jury must also be told, that ehose very declarations are inadmissible as evidence to lead them to the same conclusion. Further consideration may shew me, that this would be the proper course, but I have not yet been able to satisfy my mind

Sixthly. It was argued for the defendant, that as the lessors of the plaintiffs claim under this grant to Francis Crooks, it was incumbent on them to shew that he was living at its date; and Doe Nnight v. Nepean (α) was relied upon for this position. It is, however, sufficient to read Lord Denman's language, to shew that judgment in that case affords no autho-

rity to sustain this argument. He says, "there is no doubt that the lessor "of the plaintiff must recover by the strength of his own title, and in "order to do so, must prove that he had a right to enter on the lands "sought to be recovered, within twenty years before the ejectment brought; "and consequently, as the presumption is, that a person once alive con-"tinues so until the contrary is shewn, the lessor of the plaintiff was bound to "prove; 1st, the death of Matthew Knight, and 2ndly, That it took place "within twenty years before the ejectment brought." In the very language of Lord Denman, the presumption is, that Francis Crooks was living on the 10th March, 1797, having been alive in this province only a few months before; and it is for the defendant to shew the contrary, and so to avoid the grant under which the lessors of the plaintiff's claim. And it was for this very purpose, that the defendant tendered the evidence which was rejected at the trial on specific objections; though it seems not to have been denied, on the part of the plaintiff, that the defendant might, by hear-say evidence alone, have established the time of Francis Crooks's death.

As upon what appeared at the trial, it does not appear to me that any of the evidence rejected ought to have been received, I am of opinion there should be a new trial only upon payment of costs. (a)

JONES, J. and McLEAN, J., concurred in opinion with Mr. JUSTICE DRAPER.

MACAULAY, J., in the Practice Court.

Per Cur.—New trial on payment of costs.

ROBINEON, C. J., dissentiente as to payment of costs.

(a) The Honorable Mr. Justice Draper having obligingly furnished the Reporter with a number of selected authorities upon the subject of hearsay evidence, arranged under several heads, applicable to the present case, he gladly avails himself of the opportunity of presenting them to the profession in the shape of a note, at the end of Mr. Justice Draper's judgment.

Hearsay evidence—declarations of members of the family admissable after their death.

Herbert V. Tuckal, T. Raym. 84; 7 Ea. 20; Goodright ex. dem. Stevens v. Moss, Cowp. 591; 13 Ves. 514; Vowles v. Young, 13 Ves. 140; Bull. N. P. 294; Doe v. Tarver, Ry. & M. 141; Doe Jenkins v. Davies, 11 Jur. 607; Kishbon v. Nesbitt, 2 M. & Rob. 554.

Persons connected only by marriage with the party respecting whom the declarations are made, fall within the meaning of the term "relations."—Vowles v. Young, 13 Ves. 141; Doe v. Randall, 2 Moo. & Pay. 20; Doe v. Harvey, Ry. & M. 297; Johnson v. Lawson, 9 J. B. Moore. 190; 2 Bing. 86; Phill. Ev. 246; Crease v. Barrett, 1 Cr. M. & R. 919.

The relationship of the parties must be shewn by testimony, independent of their own declarations, that they are relations—Banbury Peerage Case, Selw. N. P. 755; Monkton v. Attorney General, 2 Russ. & Myl. 156; Rex v. Erith, 8 Ea. 539; Davies v. Morgan, 1 Cr. & Jer. 591.

Persons not being actually relatives, are not of that class whose declarations after their death are admissable.—Berkley Peerage Case, Phil. Ev. 245, and see note to 1 Car. & K. 276; Johnson v. Lawson, 2 Bing. 86, 9 J. B. Moore, 190; Doe Sutton v. Ridgway, 11 B. & Al. 53; Casey v. O'Shaughnessy, 7 Jur. 1140; Sussex Peerage Case, 11 Cl. & Fin. 85.

But though the evidence of declarations of deceased members of a family is admissible they must have been made ante litem motam; and this rule applies to other cases, where evidence of reputation is admissable, as well as to pedigree.—4 Camp. 410, 416, 417, 421; Rax v. Cotton, 3 Camp. 444; Slane Peerage Case, 5 Cl. & Fin. 23; Monkton v. Attorney General, 2 Russ. & Myl. 160; Walker v. Beauchamp, 6 C. & P. 561; Freeman v. Phillips, 4 M. & S. 486; Sussex Peerage Case, 11 Cl. & Fin. 85.

The admission of hearsay evidence-reputation-depends on the nature of

HOYT V. WIDDERFIELD.

The right of dower, which a woman has during coverture, is not an interest, the release of which the covenantee can require, under the ordinary covenant for further assurance.

Semble, (per Macaulay J.) that if the woman had survived her husband, an action would only lie upon an effectual conveyance to pass her estate having been tendered.

If an action upon the common covenant for further assurance, the covenantee must aver in his declaration, that the conveyance which he required was devised by himself or his counsel and tendered to the party to be executed.—Macaulay, J., dubitante.

Where the declaration alleges that A., wife of B, "having a lawful right to an estate in dower," refused with B., to execute a release—it will be intended, in the absence of any further averment—that the release was required from A., as the wife of B. and not as the wife of a former husband whom she had survived.

Covenant for good title. The plaintiff declared on the following covenant:—"That the defendant and his heirs, and all and every person

the question being tried; such as pedigree, prescriptive right or custom. If the question be different, then, though the evidence might be admissible to prove the particular fact—in the case of pedigree, &c.,—it will be rejected.—Rex v. Eriswell, 3 T. R. 707; Rex v. Chadderton, 2 Ea. 27; Rex v. Erith, 8 Ea. 539; Doe v. Thomas, 14 Ea. 317; Outram v. Morewood, 5 T. R. 121; Kidney v. Cockburn, 2 Russ. & Myl. 167; Figg v. Wedderburne, 6 Jur. 218; Rex. v. Rishworth, 1 Gale & D. 597, 6 Jur. 297; Regina v. Ecclesal Bierlow, 1 Gale & D. 160; Regina v. Lydeard St. Lawrence, 1 Gale & D. 191.

Death of parties may be established as a matter of presumption from facts proved: in which case the presumption is general, involving no particularity of time or place. To establish these particulars, evidence is necessary, though hearsay may establish the general position.—Throgmorton v. Walton, 2 Roll. Rep. 492; Wilson v. Hodges, 3 Ea. 312; Buller N. P. 294, (c); Doe v. Jesson, 6 Ea 80; 19 Car. II. ch. 6, sec. 2: d Jac. 1 ch. 11; Doe v. Griffin, 15; Ea. 293; Watson v. King, 1 Stark, N. P. C. 121; Webster v. Birchmore, 13 Ves. 262. Brown v. Petre, 2 Swanst. 235; Hopewell v. De Pinna, 2 Camp. 113; Rex v. Twining, 2 B & Al. 386; Rex v. Harborne, 2 Ad. & El. 540; Doe v. Deakins, 4 B. & A 433; Rust v. Baker, 8 Sim, 443; Rex v. Buchanan, 1 Cr. & Jer. 195 Doe Hall v. Penfold, 8 Car & P. 536; Doe Knight v. Nepean, 5 B. & Ad. 86, confirmed in crror, 2 M. & W. 894; Watson v. England, 8 Jur. 1062, 14 Simons, 28; Stickney v. Knight, 13 L. J. N. S. Chancery, 181; Leach v. Leach, 8 Jur. 211.

Declarations, verbal or by written entries, are receivable in evidence when the parties who made them are dead, in actions generally, and not as the case of declarations of deceased relatives confined to pedigree cases and questions, or as with regard to reputation to cases of prescriptive public rights or customs.

Such entries are of two classes. 1st; Those made by parties having peculiar knowledge of the facts, having no interest to misrepresent them, and made in the ordinary course of official or professional, or other business or duty, and immediately connected with the transaction or discharge of it, and contemporaneous, or nearly so, with the transaction to which they relate. 2nd. Those operating against the interest of the parties by whom such entries are made. - First class ; Price v. Torrington, Salk. 285; Brain v. Preece, 11 M & W. 773; Pitman v. Madox, Salk. 690; Champney v. Peck, 1 Stark, 404: Pritt v. Fairclough, 3 Camp. 305; Hayedom v. Reid, 3 Camp. 379; Doe v. Robson, 15 Ea. 34; Clark v. Wilmot, 1 Y. & C., N. C. 53; Short v. Lee, 2 Jac. & W. 464; Doe v. Turford, 3 B. & Ad. 890; Poole v. Dicas, 1 Bing. N. C. 649; Marks v. Colnaghi, 3 Bing. N. C. 418. Second class: Warren v. Grenville, Str. 1129; 2 Burr. 1072; Barry v. Bebbington, 4 T. R. 514; Stead v. Heaton, 4 T. R. 669; Higham v. Ridgway, 10 Ea. 109; Harpur v. Brock, 3 Woodd. 332; Davies v. Pearce, 2 T. R. 53; Annesley v. Anglesea, 17 State Trials, 1157; Roe v. Rawlings, 7 Ea. 279; Skepwith v. Shirley, 11 Ves. 64; Ivat v. Finch, 1 Taunt. 141; Peaceables v. Watson, 4 Taunt. 16; Stanley v. White, 14 East, 341; Doe v. Pettit, 5 B. &

"and persons whomsoever, having or equitably or lawfully claiming, or who should or might hereafter have or lawfully or equitably claim, any estate, right, trust or interest, in, to or out of the said lands and premises, should and would from time to time and at all times thereafter, at any reasonable request, and at the proper costs and charges in the law, of the plaintiff, his heirs and assigns, make, do, acknowledge, levy, suffer and execute, or cause to be made, done, acknowledged, levied, suffered and executed, all such further and other lawful and reasonable acts, deeds, conveyances and assurances in the law whatsoever, for the further, better and more perfect granting, conveying and assuring the said land and premises, with the appurtenances, unto and to the use of the plaintiff, his heirs and assigns for ever, as by the plaintiff, his heirs and assigns, or any of them, or his, their or any of their counsel learned in the law, shall be reasonably devised, advised or required."

Breach: "Yet the said plaintiff saith, that the plaintiff, for the further, "&c., did afterwards, on the 1st day of August, 1846, request one Daniel "Honeywell and Sarah his wife, which said wife, at the time of making "the said indenture, and continually from thence hitherto, had and still "hath lawful right and title to an estate in dower in the said lands and premises, at the proper costs and charges in the law of the plaintiff, to make and execute a deed of release for to pass the estate in dower in the said land of the said Sarah, wife of the said Daniel Honeywell, "legally to the plaintiff; yet the said Daniel Honeywell and Sarah his "wife did not nor would, at the proper costs and charges in the law of the plaintiff or otherwise, when they were so requested, or at any time before or afterwards, make and execute a deed of release for the purpose "aforesaid, but wholly refused and neglected so to do, without the payment of a large sum of money, to wit, the sum of 50%, by the plaintiff to them for that purpose."

A plea was put in, which was demurred to and abandoned.

Al. 223; Doe v. Tarver, Ry. & M. 141; Doe Gallop v. Vowles, 1 M. & R. 262, 2 Smith, L. C., note, 195-6; Chambers v. Bernasconi, 1 Cr. & J. 451; 1 Cr. M. & R. 363; Gleadow, v. Atkin, 1 C. R. & M. 424; 3 Tyr. 302; Crease v. Barrett, 1 Cr. M. & R. 919; Middleton v. Melton, 10 B. & C. 317; Whitnash v. George, 8 B. & C. 556; Lloyd v. Wait, 1 Phil. 61; Doe v. Colcombe, 1 Carr. & M. 155; Brune v. Thompson, 1 Cr. & M. 34; Doe v. Mobbs, 1 Carr. & M, 1 De Rutzen v. Farr, 4 Ad. & El. 53; Doe v. Hawkins, 1 Gale & D. 551, 6 Jur. 215; 2 Q. B. 213; Musgrave v. Emmerson, 16 L. J. Q. B. 174; Sussex Peerage Case, 11 Cl. & Fin. 85; Regina v. Worth, 4 Q. B. 132; Brain v. Preece, 11 M. & W. 773; Price v. Lord Torrington, Salk 285; Williams v. Geaves, 8 C & P. 592; Doe v. Burton, 9 Car. & P. 254; Davis v. Lloyd, 1 Car. & K. 275; Doe Stephen v. Ford, U. C. Rep. 352.

Declarations accompanying acts done, are evidence to explain those acts, when they are brought into question between parties affected by them, as part of the res gestæ.— Thompson v. Trevanion, Skin. 402; Bibb v. Thomas, 2 W. Bl. 1043; Phillips v. Eamer, 1 Esp. 357; Penn v. Scholey, 5 Esp. 243; Kent v. Lowen, Camp. 176; Aveson v. Kinnaird, 6 Ea. 188; Fellowes v. Williamson, 1 M. & M. 306; Vacher v. Cocks, 1 M. & M. 353; Rex. v. Whitehead, 1 Car. & P. 69; Walton v. Green, 1 Car. & P. 621; Moore v. Strong, 1 Bing. N. C. 441; Guthrie v. Crossley, 2 Car. & P. 301; Ryle v. Haggie, 1 Jac. & W. 234; Johnson v. Baker, 4 B & Al. 440; Lewis v. Rogers, 1 Cr. M. & R. 48; Beachamp v. Parry, 1 B. & Adol. 91; Eden v. Blake, 13 Mee. & W. 614.

But reasons assigned by third parties, explanatory of their acts in relation to a matter in litigation, are not receivable unless they are called.—Tilk v. Parsons, 2 Car & P. 201 Ashley v. Harrison, 1 Esp. 50.

- D. B. Read, in the argument on the demurrer, admitted the plea to be bad, but insisted that the declaration was also bad upon the following grounds:
- 1. That there was no covenant in the deed to release dower, and that the breach alleged was not within the covenant.
- 2. That no tender of release of dower was alleged—or tender of costs and charges, or any other tender.
- 3. That it was not stated what kind of release was required, or that Honeywell and his wife had notice what release was required of them; nor would a mere release have been sufficient, without a justice's certificate.
 - 4. That wife had no dower or estate in dower to give.
- 5. That the refusal was not absolute, but qualified, and the breach was not supported by the covenant.

He cited, in support of these several grounds, Co. Litt. 208, a, sec. 336; Shep. Touch. 168; Cro. Eliz. 9; 2 Co. 3; 4 Leon. 62; 5 Co. 22; 9 Bythewood, 282; Shower, 69; Cro. Jac. 571; Bower v. Bass, E. T. 1841, in this court.

Cameron, Sol. Gen., contra.

There are but two exceptions taken to the declaration, which the opposite counsel seems to urge with any hope of success. The first is, that the breach of covenant is ineffectually set out, in not alleging, that the covenantee requested Honeywell and wife to execute a conveyance, such as he or his counsel had devised, prepared and tendered. The second is, that, supposing the breach well enough assigned upon the covenant, the convenience has no right of action against the covenantor, in consequence of Mrs. Honeywell, the wife of Mr. Honeywell who is still living, refusing to bar her dower.

Upon the first point.—It is submitted, that the breach is well assigned. It cannot be said that there is no averment in the declaration of a tender of the deed to Mr. Honeywell and wife, such as the convenantor required. The declaration, on the contrary, clearly shews, that a release was tendered and refused to be executed, unless the sum of 50L should be paid, and which was in fact executed by Honeywell and wife when that sum was paid. All further question, therefore, as to a tender, seems to be at an end—and the only point in fact for the court to decide is—had the plaintiff a right, under the covenant for further assurance, to require a lease of dower from Honeywell and wife?

The case of Bower v. Bass in this court, has been relied upon by the opposite counsel as expressly in his favour. A little consideration, however, given to the point which was really determined by that case, and the difference between its facts and those set out in this declaration, will shew, that it is very far from being a case precisely similar to the present.

All that was determined by the court in Bower v. Bass was, that, upon the covenant for further assurance, an action could not be sustained by the covenantee against the covenantor, because the wife of a party who had been interested in the title, and who was still living, refused to execute a release of dower. The court held, that, as the wife had no estate in dower during the coverture, she had nothing which she could release, and that her refusal to execute a nugatory instrument could give no right

It is not intended to question the law as laid down by the court in that case; but it is submitted, that the declaration here does not allege, that Mrs. Honeywell's right to dower accrued in consequence of her marriage with Mr. Honeywell. On the contrary, the averments in the declaration necessarily import, that her right to dower attached, not as the wife of Honeywell, but as the wife of a former husband whom she had survived. The allegation is, "that Sarah, wife of David Honeywell, having a law-"ful right to an estate in dower," refused to execute the release. Now, as this very case of Bower v. Ross, together with numerous English authorities cited by the opposite counsel, decide, that a woman during coverture has no "lawful right" to an estate in dower, it must be assumed, certainly upon general demurrer, that the "lawful right" to dower, which it is alleged she had, accrued to her, not as the wife of Honeywell, (a fact which is merely mentioned to shew why he was made a party to the release), but as the wife of a former husband now dead.

If, then, the legal intendment upon the whole declaration, in the absence of any averment to the contrary, must be, that Mrs. Honeywell had an estate in dower by reason of a former marriage, it is quite clear, that Bower v. Bass does not only not apply, but that the principle, upon which that decision was given, may be taken as strong authority, inferentially, in favour of this plaintiff's right of action.

D. B. Read in reply.

It may be admitted, that the exceptions taken to the declaration are all embraced in the two which have been mentioned by the opposite counsel; and—however ingenious the argument of the learned counsel upon one of them may have been—there can be but little question, that both of them will be found entitled to prevail.

Upon the first point—all that the declaration can be taken to aver is, that Honeywell and wife did not make and execute a release—that is the breach expressly assigned; but the covenant does not require Honeywell and wife to make a release. All that they are required to do is, to execute such a release as the plaintiff or his counsel may advise—they are not to make it, and they could very properly refuse to make it, when requested—they might make it if they chose upon terms of their own, and it seems they did; but that is no reason why the defendant should be called upon to pay the sum they demanded, for doing, what as far as the defendant was concerned, they could not be compelled to do at all. There is no averment in the declaration to shew, that the tender of a deed to Honeywell and wife, advised or required by the plaintiff or his counsel—the very condition the covenant makes precedent to the request to Honeywell and wife to release—had ever been made. The declaration is therefore bad, on this substantial ground of objection.

With respect to the second point, which of course is the main point to be determined, there can be but little doubt that no breachof the covenant for further assurance can be well assigned upon Honeywell and wife's refusal to execute a release of dower.

The learned counsel finding himself much pressed by the decision in Bower v. Bass has very ingeniously endeavoured to evade its force by choosing to assume, that no request was made to Mrs. Honeywell, as the wife of Honeywell, to release her dower; and that it was not intended to urge any right to a release from her as the wife of Honeywell, but of

some former husband, whom she had survived. But what is said in the declaration of any former husband? Nothing from beginning to end, as might well be expected, when he only existed in the learned counsel's imagination. How could the defendant know that the declaration meant to set up such a claim? The argument is, that the declaration must be taken to intend a former marriage, from the use of the words "lawful estate." But all that can be inferred from that expression is, that the plaintiff, when he used it, supposed that Mrs. Honeywell, as Mrs. Honeywell, had a lawful estate in dower-while she in truth legally never had. He now sees that he has been too precipitate in his action; that he should have waited for Mr. Honeywell's death; that his last hope is, that the death of a former husband, whom his counsel imagines to have once lived, will be taken by the court as a substitute for the death of poor Mr. Honeywell, whom fortunately, having alleged to be alive, he cannot so easily assume to be dead. It is submitted—that though the court may admire the ingenuity of the learned counsel—they cannot with safety adopt his reasoning.

Assuming, however, that Mrs. Honeywell's claim to dower accrued as the wife of a former husband since dead—and that it had been so alleged—still the plaintiff could not recover—and for this reason—that the conveyance, which he required to be executed, would be wholly ineffectual to pass Mrs. Honeywell's estate in dower.

If an action like the present would lie upon a covenant for further assurance during the coverture, then the wife, being entitled only to a contingent right: a simple release, such as was demanded, would have been good to pass the wife's interest; but as it is admitted by the opposite counsel, that no action will lie during coverture upon the wife's contingent right-and as it is in consequence insisted upon, in order to get rid of this difficulty, that the husband is dead, and that it is not a contingent right in Mrs. Honeywell which is sought to be released, but an estate for life—it will then follow, that the simple release, if given, would have been wholly nugatory to pass the wife's estate. A simple release cannot pass by our law an estate for life in a married woman-it must, to give it effect, be accompanied by an acknowledgment of the woman, duly taken as our act prescribes. Now, this is not averred to have been done. The release, therefore, would have been manifestly inoperative and of no use when executed. How then can the defendant be made liable for its non-execution?

It is submitted therefore—that there being no averment of a tendor of the deed required to be executed—that the case of Bower v. Bass being directly opposed to any right of action during the coverture—and that the description of conveyance, if tendered, being ineffectual for the purposes required, even though the husband were dead—the declaration must be held bad upon general demurrer.

ROBINSON, C. J.—The plea is not attempted to be supported, but the defendant excepts to the declaration.

The judgment of this court in Bower v. Bass, E. T. 1841, is material to be considered in this case. It was there determined, that the wife's dower was not an incumberance so long as the husband lived, and that she could not be said to have a right of dower till his death.

The case also turned upon the covenant for further assurance, but

there the court held, that the breach was at any rate insufficiently assigned, though they intimated also, that there could not have been a breach well assigned under the covenant, the husband being still alive.

It is argued in this case, that this declaration does not shew that the alleged claim of Sarah Honeywell to dower may not have accrued to her as the wife of a former husband now dead, and that it must indeed be taken to import that.

But it seems to me, that as Sarah Honeywell is spoken of throughout as the wife of Daniel Honeywell now living, we are not to intend that she has been the wife of any one else, or claims in any other capacity; and if she does, the plaintiff ought to have averred it, for she could have no claim to dower, except by reason of a marriage, and that ought to have been averred, so that the defendant might know what claim was set up. -2 Saund. 43.

It may be contended, however, that the plea of readiness to perform has cured that objection, because the defendant by it admits a knowledge of the claim, and relies on the readiness of Sarah Honeywell to release it.

But the declaration is, in my opinion, bad, in not expressly averring, that the plaintiff or his counsel had devised and required a certain conveyance to be executed. The breach is, that Honeywell and his wife did not make and execute a release, &c. The covenant is, that any person, having or lawfully claiming any estate, shall make and execute such deed, &c., as may be devised or required by the plaintiff. The breach is, that they would not make and execute a release (not averred to have been tendered or devised by the plaintiff), without receiving 50l. But they were at liberty to refuse, except on those terms or on any other terms, because the defendant had not engaged that they should do so.

Then, the plaintiff saying that he was obliged to pay and did pay them 50*l*. for obtaining and procuring the release, does not cure this substantial objection, because that is only asserting that he paid them 50*l*. for doing what the defendant had not undertaken that they or any one should do; that is, releasing their estate or interest otherwise than by executing a deed reasonably devised and required, which form of words make it necessary to tender a deed.

It is consistent with all that is stated in the declaration, that the plaintiff may have merely gone to Honeywell and his wife, and asked them to make him a deed releasing the wife's claim to dower, which they may have refused (which would be no breach of the covenant), and that he thereupon told them, he would give them 50l. to do that which the defendant had not undertaken they should do; that is, prepare and execute a release devised by themselves, and not by the plaintiff.

MACAULAY, J.—The case of Bower v. Bass is in point, to shew that the issue to the country should on the evidence be for the defendant. The verdict is, therefore, incorrectly found for the plaintiff according to that decision, which determined that the wife's inchoate right of dower during the coverture was not an interest, the release of which the covenantee could require, under a covenant for further assurance like the present.

The demurrer should be decided in the defendant's favour on the same principle, if the allegation in the declaration, that Mrs. Honeywell had

lawful right and title to an estate in dower in the premises, means that she had such right and title only by reason of her then husband Honeywell having been seised of the estate during her coverture, and not as an interest derived from a former husband, who had been so seised, and whom she survived.

In construing this allegation, of course the facts, appearing and governing the issue to the country, cannot be looked at; and it must be regarded exclusively as it appears on the face of the declaration, and stand admitted by the plea and demurrer.

The import of the language used is ambiguous, under which circumstances, not being helped by the plea, it is to be construed favourably for the defendants.—See Stephen on Pleading, 415, 5th edition; Hobson v. Middleton, 6 B. & C. 295.

The provincial statutes, 37 Geo. III. ch. 7, and 3 Will. IV. ch. 9, speak of the wife's interest as a right or title to dower, and a right of dower. Under the statute 2 Vic., ch. 6, sec 3, a deed of release, executed by the wife jointly with her husband, is effectual to bar her dower, without any formal acknowledgement as required by former statutes—37 Geo. III., ch. 7; 48 Geo. III., ch. 7, and 3 Will. IV., ch. 9—when executed by her alone or jointly with others. But such a release (without more) is not sufficient to pass a life estate in interest vested in a married woman—a right and title to an estate or dower derived under a former husband—the statute requiring such deeds to be duly acknowledged.—See 43 Geo. III., ch. 5; 59 Geo. III., ch. 3; 2 Geo. IV., ch. 14, and 1 Will. IV., ch. 2.

The nature of the assurances demanded, as well as the statutes, import therefore, that it was a right to dower which Mrs. Honeywell had as the wife of her then husband. There is nothing to indicate the contrary; it is not stated how otherwise, than as the wife of Honeywell (if otherwise), she acquired the right and title alleged; though it does appear that she was his wife, and such (though not so averred), she might have the right alleged.

If it were a life estate, which belonged to her as the widow of a former husband, the assurance demanded, namely, a simple release, would not be effectual to pass it; and if its execution would have been (without more) a nugatory act, I question whether it constituted such a reasonable assurance for the purposes intended, for the non-making and executing whereof the defendant is liable, as for a breach of his covenant for further assurance.

Nor is it described or designated as a vested present absolute, and not a mere prospective contingent interest; it is termed a right and title to an estate in dower, in other words, a right and title to dower in the premises. If this means anything more than the ordinary interest of a married woman to dower, in the event of her surviving her husband, it is not distinctly expressed, nor is the source whence such interest was derived mentioned, to enable the defendant to answer it. It is not represented as an estate that had been assigned to her as dower, or out of which she had a right by action of dower or otherwise to call for and enforce an assignment. It is merely stated that Mrs. Honeywell, the wife of Honeywell, had not an estate in dower, but a right and title to an estate in dower, of, in and to the premises, of which a release was demanded and ultimately procured at the price of 501.

If it is to be regarded, as I think it may, merely as a contingent right of dower as the wife of Honeywell, then the case of Bower v. Bass is against the action; and the plaintiff's allegation, that he was obliged, for the better, further and more perfect granting and conveying of the said lands and premises, to him, his heirs and assigns, to pay the said Honeywell and wife the said sum of 50l., to obtain the said release of the said estate of dower therein, is not warranted by the premises; the contingent and incohate right of dower of a feme coverte during the coverture, having been held in that case not to be such an interest as the covenantee can, under a covenant like the present, require to be released, as necessary for the better, further and more perfect granting and conveying the estate, of which he is otherwise fully and absolutely seised and entitled in fee.

If, however, it is to be looked upon as a vested estate in Mrs. Honeywell as the widow of a former husband, I am disposed to think the defendant not responsible to reimburse the plaintiff the outlay incurred by him in procuring the release, it being per se an ineffectual mode of conveying the life estate of a married woman, and a futile and a nugatory proceeding, and not a reasonable assurance, for which the defendant should pay; because such a deed, without being duly acknowledged (and no such acknowledgment appears) would be null and void by the statute lastly above mentioned. And if so, the estate of Mrs. Honeywell remaining in statu quo, the defendant would not be bound to reimburse moneys fruitlessly expended by the plaintiff without his knowledge or assent. Nor would the demand of a deed, useless and inoperative, to impart the interest sought to be extinguished, be a reasonable assurance, the refusal to make and execute which would constitute the only breach of covenant.—Platt on Cov., 157, 342; Yel. 44; 9 Price, 43.

It has not been contended, that the terms of the covenant required a previous call upon the defendant, to cause and procure Honeywell and his wife to make and execute a release of her dower, in order to render him liable for a breach of covenant by reason of their refusal; nor do I know, that the very general and comprehensive words of the covenant would permit of any such objection to the declaration as framed.

But if the case depended upon the sufficiency of the breach assigned, in omitting to allege the tender of a release to Honeywell and wife for execution, I am not prepared to adopt the views entertained on this point by the rest of the court. And in relation to this subject, as well as to the right of the covenantee to require a release of dower from a married woman during her coverture, under such a covenant as the present, I should be disposed, so far as my own humble judgment goes, to adhere to the opinion expressed by me in Bower v. Bass, viz., that he has a right to call for such a release; and that if the husband and wife, being required to make and execute the same at the costs and charges of the covenantee, refused to do so, instead of excusing themselves, because no instrument of release was tendered, or naming the expense to be advanced by the covenantee to enable them to make it at his own costs and charges, that a breach assigned in the foregoing terms is good on general demurrer, though if on a covenant worded like the present, it was incumbent on the plaintiff to tender for execution such further assurance as he required, and that such tender was a condition

precedent to his right to sue on the covenant, I have great reason to distrust my impressions.

A comparison of the case with the present covenant will shew, that it differs in terms from many, if not from all of them; and that the necessity of the obligee or covenantee tendering an instrument for execution, has been determined only by reason of the peculiar wording of the condition or covenant.

Here the covenant is, that all persons having, or lawfully or equitably claiming any estate, right, title or interest, in, to or out of the premises, should and would, at every reasonable request, and at the costs and charges of the plaintiff, make, do, levy, suffer and execute, or cause so to be done, all such further and other lawful and reasonable acts, deeds, conveyances and assurances, &c., as by him should be reasonably devised, advised, or required.

Now if, notwithstan-ling the covenant that such persons should make (1 Mod. 104; 4 East. 477) as well as execute at the costs of plaintiff, the words "reasonable request" require that he should prepare and tender the instrument as best exhibiting what he does require, then it would follow that such tender is a condition precedent; and if so, the argument is no doubt very forcible, that to render the defendant liable for a breach of covenant, by reason of the refusal of Honeywell and wife, such tender should have been made and averred on the ground, that although it might do if Honeywell was a covenantor, still his bare refusal, under circumstances in which the plaintiff has not done all that was incumbent upon him, could not amount to a dispensation or discharge so far as the defendant was concerned—the said Honeywell, a stranger, having no discretion or authority to dispense with anything, so far as respected the defendant's responsibility and liability.

This I should be more inclined to deem the soundest view of the case, if it did not appear, as it does, that in point of fact, whether tendered originally or not, a release was afterwards made and executed, rendering the alleged breach of covenant not an absolute refusal, for no such refusal is alleged, but only a qualified one, i. e., without the payment of a large sum of money which was afterwards paid, and the release given. It seems to put an end to all question of tender, and to reduce it to the consideration, whether the plaintiff had a right under his covenant to require such a release; and if so, whether the defendant is bound to compensate him for the outlay exacted from him by Honeywell and his wife, as a consideration for their executing it.

The case of Bower v. Bass would deny the right of action on the first ground; but, as already stated, my own opinion in that case was in favour of it; and if the action would have have been maintainable upon a formal tender and refusal, my present opinion is, that the plaintiff would be entitled to recover in this cause, but whether to the extent of any sum paid to induce Honeywell and his wife to execute the release, would depend upon the existence of the right or interest alleged to have been in the wife, and the reasonableness of the amount paid for her release thereof.—See Smith v. Compton, 3 B. & A. 497; Blike v. Dymoche, 9 Moore, 203, and 2 Bing, 105.

The interest asserted is not denied in the pleading involved in this demurrer; nor is the reasonableness of the sum paid to procure a release

of it in question, if the plaintiff be entitled to recover anything on the facts alleged in the declaration.

JONES, J.—I think the declaration bad. The defendant was bound by his covenant to execute or cause to be executed such further assurance as should be devised, advised or required by the plaintiff, or his counsel learned in the law, at the proper costs and charges of the plaintiff.

The defendant was not bound to execute every and any assurance, but only such as should be devised by the plaintiff or his counsel; therefore, before the plaintiff can recover, he must shew that the defendant refused to execute an assurance, devised by himself or his counsel, and shewn to the defendant. No such averment is contained in the declaration, and it is consequently bad.

The defendant was bound to make further assurance, such as should be devised by the plaintiff or his counsel, or do such reasonable act as should be required by plaintiff at the costs of the plaintiff. The defendant could not know what assurance was required, until that which was required to be executed was shewn to him; it was not sufficient for the plaintiff to say he required a release of dower. The release should have been drawn by the plaintiff, and shewn to the defendant, and if any act was required to be done by the defendant, the expense attending the performance of such an act should have been tendered to the defendant.

In Steer v. Shalecroft, 12 Mod. 400, Lord Holt says, that in a covenant to make a conveyance at the charge of the covenantee, the covenantor is not bound to perform the covenant till tender of the charges. And before a covenantor is bound to make such assurance, as should be desired by the covenantee or his counsel, the covenantee ought to shew that he has devised such a particular assurance. — 2 Wood's Conveyancing, 399.

From all the cases which I have seen, it appears to me, that what is meant by a covenantor making such assurance as shall be devised by the covenantee, means signing and sealing an assurance prepared for execution.

In Lassels v. Catterton, 1 Mod. 67, the action was on a contract for further assurance, the covenant being to make such assurance as counsel should advise. It was alleged that such conveyance was tendered as was advised by counsel.

In a covenant to make such assurance as the counsel of the covenantee shall advise, the covenantee tendered a deed for execution.—Vin. Ab. vol. 5, 131, pl. 6; also 132, pl. 11, 12, 13, 14, 15, 16; page 136, pl. 30, 31.

In a contract to make such assurance as the counsel of the covenantee should advise, the covenantee must give notice of the assurance, and must shew it to the covenantor and permit him to read it, and to go to his counsel to consider it; and the covenantor is to have a convenient time after the assurance shewn to him to be perfect it.—Bennett's case, Cro. Eliz. 9. And in such cases the devise must be by the counsel of the covenantee, and not by the covenantee himself—per Anderson, C. J., Vin Ab. vol. 5, page 139. If the covenant be to seal a conveyance generally, then the counsel of the purchaser is intended to draw it, and the purchaser must tender it.

In Washington v. Murden, Cro. Eliz. 681, on a covenant to convey by

assurance to be devised by purchaser, there is an express averment that the covenantee tendered a deed to be sealed and executed.

I do not think it was a reasonable request on the part of the plaintiff, to enquire a release of dower. It would have been so, if an estate in dower and existed at the time. But the wife had only a contingent right of dower, which would have been consummated and been an absolute estate upon the death of her husband.

The covenant is for further assurance from all persons having any estate, right, trust or interest at the time of the execution of the deed; and also from all persons "who should or might hereafter have any estate, right," &c. Under this clause, it is clear that the plaintiff, upon the death of her husband, would be entitled to call for a release of dower, but I think not before.

In the case of Bower v. Bass in this court, it was held, that the contingent right to dower of a married woman was no present incumbrance upon land, and it was said, that no action could be maintained against a grantor in a deed conveying the estate in fee, for not procuring a release of dower on the usual covenant for further assurance. There can be no better illustration of the soundness of that decision, than the fact stated in this cause, that since the action had been commenced the wife had

McLean, J., being in the Practic Court during the argument, gave no judgment.

DRAPER, J., absent during the argument in England.

Per Cur. - Judgment for defendant on demurrer.

LAND ET AL. V. WOODWARD.

The plaintiffs were owners of the Laty Bagot, in which wheat was brought down Lake Erie to the defendant, to be stored for Messrs Young & Co. When it was brought to the defendant, the master of the schooner demanded 221 10s. for freight, and 1901 for the detendant, the master of the schooler demanded 22. 10s. for freight, and 1904. for demurrage—said he had a lien on the wheat to that amount, and wished the defendant to pay it before he would deliver the wheat—this the defendant declined; but it was agreed between them, that the defendant should receive the wheat upon giving the following undertaking in writing: "I will retain 750 bushels of wheat, the "property of Messrs. Young & Co. of Montreal, and part of the cargo of the Lady "Bagot, until your claim of demurrage, for detention of the schooner Lady Bagot at "the port of Sandusky, is settled, also covering freight on amount retained."

The plaintiffs subsequently demanded the wheat from the defendant, who, although still retaining it in his possession, declined to give it up to the plaintiffs, saying that he was indemnified by Messrs Young & Co., who refused to pay the plaintiffs' claim.

The plaintiffs, upon these facts, sued the defendant on three counts: 1. Specially upon the case, alleging the plaintiffs' right to lien for freight and demurrage—then setting out the agreement, and assigning, as a breach of defendants duty, his delivering the wheat to Messrs. Young & Co. without payment of plaintiffs' lien. 2. Upon an agreement to re-deliver the wheat to the plaintiffs when requested, and a breach of duty in not delivering. 3. In trover.

Held per Cur., that the evidence did not support the first count—as the defendant still retained the goods—nor the second count, as there was no agreement to re-deliver to the plaintiffs—nor the third count, as the agreement admitted the property in the wheat to be in Young & Co., and not in the plaintiffs

Held, also, that the second count, being properly in assumpsit, could not be joined with the count in trover.

And, that the plaintiffs, under the circumstances, had no lien for either freight or demurrage.

Plaintiffs sued in trespass on the case.

.The first count was special, and set forth, that plaintiffs, before the grievances complained of, were possessed of 750 bushels of wheat, being part of the cargo which plaintiffs had carried in a vessel called the Lady Bagot, for Messrs. Young & Co., to whom the wheat belonged, from Sandusky to St. Catherines, there to be delivered at defendant's mills, to be ground for Young & Co.; that plaintiffs had a claim on Young & Co. for demurrage, and for freight due from Young & Co. for carrying the said wheat as aforesaid, to the amount of 2001., for which he had a lieu on the wheat; and that defendant, in consideration that plaintiffs would deliver to defendant the 750 bushels of wheat, to be kept by him for plaintiffs until their claim should be paid, agreed with plaintiffs to keep and detain the wheat for plaintiffs, and not to deliver it up to Young & Co., until the said claims thould be paid; that plaintiffs delivered the wheat to defendant, who accepted it on the terms aforesuid; that it thereupon became defendant's duty to keep safely the said wheat for plaintiff's, and not to deliver the same to Young & Co., until, &c.; that although the charge for demurrage and freight has not yet been paid, of which defendant had notice, yet that defendant, not regarding his duty in that behalf, but intending to injure and deceive, &c., without the knowledge or consent of plaintiffs, delivered up the wheat to Young & Co., without payment of plaintiffs claim, &c., and plaintiffs had thereby lost and been deprived of the said wheat and of any lien, which they might or could have had upon the same, and had thereby lost all means of recovering the same, and had been otherwise greatly injured.

In the second count plaintiffs charged, that in consideration that they would deliver to the defendant 750 bushels of wheat of plaintiffs, to be safely kept for plaintiffs and redelivered to them when required, defendant agreed to receive and keep the same, and to deliver it up to plaintiffs when required; that plaintiffs did deliver the wheat to defendant to be kept, and afterwards, viz., on, *&c., requested defendant to deliver the wheat up to them; yet that defendant not regarding his duty in that behalf, did not nor would deliver up the said wheat to plaintiffs, but wrongfully kept the same, and afterwards converted and disposed thereof to his own use.

To these counts were added a common count for trover.

Defendant pleaded "not guilty" to first count.

2ndly. Denied the plaintiffs' lien as set forth in that count.

3rdly. To first count, denied that he agreed in mauner and form as therein stated.

4thly. To second count, denied that he made such agreement as therein stated.

5thly. To the count in trover, denied that plaintiffs were possessed of the wheat in manuer and form, &c.

It was proved, that plaintiffs were owners of Lady Bagot, in which the wheat was brought down Lake Erie to defendant to be stored for Young & Co., and that when it was brought the master of the schooner demand-

ed 221. 10s. for freight, and 1901. for demurrage, and wished the defendant to pay it before he would deliver the wheat, which the defendant declined. But it was agreed between them, that defendant should receive the wheat upon giving this undertaking in writing, which he did: "I "will retain 756 bushels of wheat, the property of Messrs. Stephen Young "& Co., of Montreal, and part of the cargo of the Lady Bagot, until your "claim for demurrage, for detention of the schooner Lady Bagot at the "port of Sandusky, is settled, also covering freight on amount retained." This was given 31st May, 1847.

It was proved for the plaintiffs, that one of the plaintiffs went, in July following, to defendant, and demanded the 750 bushels of wheat, but defendant refused to give it up, saying that he was indemnified by Young & Co., and he declined to pay the plaintiffs' claim.

It was objected, that the action should have been assumpsit---not case.

2ndly. That there was no agreement, such as is declared on in the second count.

3rdly. That there was no evidence to support trover.

The defendant proved clearly, that he still retained the 750 bushels of wheat in store, and had not delivered them up to Young & Co.

The plaintiffs admitted they had no lien for demurrage, unless under the effect of the defendant's contract.

The learned judge held, that there could be no recovery on the count in trover, because defendant had not converted the wheat, and was not bound by his undertaking to deliver it up to the plaintiffs, but only to retain it until the freight was settled for; and he had detained it.

The first count he thought clearly not proved, because defendant had not delivered the wheat to Young & Co., which was the breach of duty complained of; and that there could be no recovery on the second count, because the defendant had not agreed, as is set forth in that count.

A verdict was given for the plaintiffs on the second and third issues, and for defendant on the first, fourth and fifth issues.

P. M. Vankoughnet obtained a rule for a new trial, on the law and evidence, and for misdirection.

Cameron Sol. Gen., shewed cause. The plaintiffs clearly cannot recover on the first and second counts, and must rely on the third count. The first and second counts are in assumpsit—not case. No allegation of duty is alleged as the foundation for either. But if in assumpsit there is then a misjoinder of counts, as assumpsit and trover cannot be joined together. If, therefore, the plaintiffs had had a verdict, they could not have sustained it. The judgment must have been arrested.—6 B. & C. 268.

Independently, however, of any legal objections, the evidence does not support any one of the counts. It is proved that wheat was retained, as agreed upon, sufficient to cover the plaintiffs' demand: they must therefore fail on the first count. They must also fail on the second count, because no such agreement as that alleged was proved. And they must also fail on the third, because the property in the wheat was clearly by the agreement in Young and Co., and not in the plaintiffs. With respect to the right of lien, there can be no doubt that there is no right in general by law to a lien for demurage.

P. M. Vankoughnet supported his rule. He admitted that there

could be no right to a lien at common law for demurrage; but he contended, that the parties might contract to give a lien in such cases.—9 B. 974. At all events, there was a lien for freight.

The first and second counts are clearly in case, and not in assumpsit. The facts stated in the commencement of both of these counts can be the only ground for assuming them to be in assumpsit, but these facts are nothing more than the inducement to shew a duty, the breach of which is the real cause of action in both counts. He cited Story on Bailments, 69; 11 Cl. & Fin. I; 3 Q. B. R. 511.

ROBINSON, C. J., delivered the judgment of the court.

It is quite clear that the evidence did not entitle the plaintiffs to recover on the first count, because, whether that count be treated as founded wholly on the contract, or as a count for a tort arising from a breach of duty imposed by the contract, it is equally true, that the breach of duty or contract, as charged there, was not committed; the defendant did not deliver the wheat to Young & Co., but still retained it, as he engaged to do.

As to the second count, the contract was not proved to be as the plaintiffs there stated it, viz., to deliver the wheat back to the plaintiffs when required, but to detain it till the plaintiffs' charges against Young & Co. were settled.

There can be no contract implied, where there was an actual express contract; and in this case the plaintiffs, who were the mere carriers of the wheat, did not leave it with the defendant as their own property, but informed him to whom it belonged, and stored it with him as the wheat of Young & Co., and to be ground for them, but stipulated that defendant should retain the wheat as it was, until their claim on Young & Co. should be settled. That is a different agreement in terms from an agreement to deliver the wheat back to the plaintiffs whenever they should demand it.

I have no doubt that the second count can only be looked upon as a count in assumpsit, and is improperly joined with a count in trover.

The same consideration applies to the third count as to the second; for if the defendant were not bound to deliver Young & Co.'s wheat to these plaintiffs, but only to retain it until their charges were settled for, then the refusing to part with the property of Young & Co., and place it in the plaintiffs' hands, was no conversion, and the plaintiffs gave no other evidence of a conversion than the refusal to let them have the wheat.

The verdict is, in our opinion, right on all the issues; for as to the plea to the count in trover, that plaintiffs were not possessed of the wheat as of their own proper goods, &c., they could not claim to be so possessed in face of the receipt which they had themselves taken from the defendant, in which the wheat is described as the property of Young & Co., and the plainliffs, when they parted with the possession which had made them bailees, and gave them for the time a special property, and took this engagement from the defendant, relied on that contract, and on their remedy under it against him.

It is admitted, that there was no right of lien on account of the demurrage; that is, no such right in general by law; and that being so, the plaintiffs, if they had acquired possession, would have had no right to hold it so far as regarded that claim; and therefore, if, by this kind of arrangement with the defendant, they could preserve their right of lien, and consequently their special property as bailees, it could only be in respect of their small demand for freight.

In McCombie v. Davis, 7 E. R 7, the court seems to have decided, that although where a broker, having a lien on goods as against his principal, tortiously transfers them, he loses his lien, yet that such principle does not extend to one who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him, in which case the court say he might preserve the lien.

If that could be said to be the same as the present case, still it could only apply to the claim for freight; but the cases are very different, for here the plaintiffs did not place the wheat in defendant's hands, meaning to give the defendant a security on it to the extent of the lien merely, or for any such purpose: but having, as they themselves declare, and as the evidence shewed, undertaken expressly to deliver Young & Co.'s wheat to the defendant, on Young & Co.'s account, they fulfilled that contract, and thereby in effect placed Young & Co.'s wheat again in their own possession—for the wheat being delivered to the defendant by their order, and for their purpose, they, Messrs. Young & Co., have again their property and possession united; and the plaintiffs must look to the special undertaking which they took from the defendant, and to their original claim on Young & Co., for their freight.

The verdict, we think, was rightly given on the several issues at the trial.

Per Cur.—Rule discharged.

Fergusson v. Joshua Adams, Peter Campbell, Andrew Dixon and William Mathewson.

Under the statute for repressing riots at elections, no power is given to magistrates to convict summarily—the offenders must be tried by a jury.

Under the Summary Punishment Act magistrates cannot issue their warrant to imprison absolutely for so many days, but only to imprison for so many days unless the fine and costs be sooner paid.

A person, who is charged in the declaration with causing another to be imprisoned, laying the act with force and arms, is charged with committing a trespass.

Where the justices have a general jurisdiction over the subject matter, upon which they have issued a warrant of commitment to a gaoler—though their proceedings are erroneous—the gaoler is not liable to an action; secus, if proceedings be wholly yold.

Queers, Does the 6th clause of the 24 Geo. II., ch. 44, as to the delivery to the plaintiff of the warrant of commitment, by the constable, apply, where the justices are sued jointly with the constable?

Semble, that a sheriff is not liable in trespass, on commitments by magistrates directed to the gaoter that turns out to be informal or insufficient, unless he has become some way a party to the imprisonment.

Quorre. Where a magistrate has, under the Summary Punishment Act, committed a party unconditionally, when his commitment should have been conditional, upon his not paying a fine—can it be said, that he has so far acted within his jurusdiction, as to make his warrant a justification to the gaoler who obeyed it?

Semble, that under the 6th sec. of the act 24 Geo. II., ch. 44, a copy of the warrant, if delivered by the gaoler, without shewing the original, and no objection made, will be sufficient. Semble also, that if the original be demanded, its production will be good, though shewn after six days.

Semble, that the sheriff, though a superior officer to the gaoler, comes equally within

the henefit of the 24 Geo. II., ch. 44.

Trespass and false imprisonment. For that defendants, with force and arms, caused plaintiff to be apprehended on the 9th of July, 1846, at Perth, and unlawfully committed to the county gaol there, and to be there detained, without any reasonable or probable cause, for thirty days.

All the defendants pleaded the general issue, "by statute."

The defendants Adams and Campbell were sued as justices of the peace, they having issued a warrant directed to "James Lourie, John Adams, "Thomas McLean and other special constables, commanding them to "convey the plaintiff to the keeper of the gaol in Perth, being convicted "upon oath of having committed an assault and battery on one Alexander "Mitchell, in Bathurst, and otherwise disturbing the public peace at the "election for the Township of Bathurst, for a member to serve in the Pro-"vincial Parliament." And the warrant concluded, "and you, the said "keeper, are hereby commanded to receive the bodies of the said George "Fergusson and the said J. C., and them safely keep in the said common "gaol of the said district, for the space of thirty days."

It was proved, that on the 12th of August, 1846, the plaintiff's attorney demanded in writing of Mathewson, one of the defendants, who is sued as being the gaoler, the perusal and copy of the warrant of commitment and detainer, under which he apprehended and took the plaintiff into custody, and kept and detained him; and that on the 18th of August a copy of the warrant was delivered to plaintiff's attorney, the original warrant not being produced. It was sworn by the person who delivered

it, that he was not sure whether he had the original warrant with him or

not, at the time he gave the copy, and that he was not asked to produce

the original warrant. It was contended by the plaintiff at the trial, that the defendant Mathewson (the gaoler) could not claim to be acquitted under the 24 Geo. II., ch. 44, though a verdict was found against the justices who made the warrant, and who were sued with him in the action, because he had not strictly complied with the statute, having only delivered a copy of the warrant, and not having shewn the original as the statute required.

And, on the part of the sheriff (Dixon) it was urged, that he was not liable merely as being sheriff of the district, to be sued for the false imprisonment, having had no personal concern in the matter, the gaolor being, in respect to such warrants as are directed to himself and not to the sheriff, to be regarded as a principal officer, and not the servant of the sheriff, so as to make the latter liable over, as in civil cases upon process directed to himself as sheriff. Verdict against all the defendants,

Adam Wilson obtained a rule for a new trial, on the ground that the form of action was in case, and not trespass, and that the evidence proved a case of trespass; or to arrest the judgment, the cause of action professing to be in trespass, while the declaration was proved in case; or why the verdict should not be set aside as against Dixon, because there was no evidence to charge him, and because it was unnecessarily ruled at the

trial, that a nonsuit could not be granted as to Dixon alone; or why the verdict should not be set aside as against Matthewson, there being no evidence to charge him.

G. A. Phillpotts shewed cause.

The magistrates, Adams and Campbell, are clearly liable on this verdict unless the technical objection taken to the form of the declaration should be found to prevail. It is submitted, there is no weight in that objection. To charge a party with causing and procuring an imprisonment by force and violence, is to charge him with a trespass. The causing and procuring an assault to be committed, makes the party who caused it and procured it as much guilty of a direct and immediate injury in the eye of the law, and therefore guilty of a trespass, as if he had himself assaulted; of this there can be no question.

Then, with respect to Matthewson the gaoler.—It is submitted, that the verdict cannot be disturbed as to him, for these reasons; that the magistrate's warrant being in itself not merely irregular, but void, the gaoler is liable at common law—that he is not shewn to have discharged himself from that liability, by the effect of the statute law, 24 Geo. II. ch. 44, sec. 6.

There can be no doubt, upon a perusal of the Summary Punishment Act 4 & 5 Vic., ch 27, sec. 27, that the magistrates have no authority by that act to imprison a convicted party unconditionally. It only empowers them to fine and imprison, if within a certain time that fine be not paid. There is, therefore, upon the face of the warrant ordering an absolute imprisonment, an excess of jurisdiction, rendering the warrant in itself void. But a void warrant affords no protection to those subordinate officers who have been instrumental in its execution. gaoler, therefore, upon the general principles of the common law is liable in this action. Does then the statute 24 Geo. II., ch. 44, contain any provision which can be said to exempt the gaoler from the liability he has incurred at common law? It is submitted that it does not. true, that the 6th clause of that act was framed for the express purpose of relieving subordinate officers from liability; but before the gaoler can claim the benefit of that act, he must shew that he has strictly complied with the terms mentioned in the 6th clause, apon which alone its protection to him has been offered. Can he then say, that upon an application being made to him by the plaintiff's attorney, he gave him a copy of the warrant, at the same time shewing him the original? The evidence proves that he did not. He gave a copy, but did not furnish the original. It may be said, however, that the case of Atkins v. Kilby, 9 L. J. 52, is in point to shew, that this is a sufficient compliance with the terms of the act. But it will be seen, that the facts in that case and in the present are different. There, though the copy was delivered, without exhibiting the original, still the plaintiff was informed of the existence of the original, and where it was. Here, nothing was said about it. An offer was made in that case to produce the original, but its production was waived-a very important fact-which is wanting here; Atkins v. Kilby is, therefore, not an authority in point. The gaoler-therefore, being liable at common law-and failing to bring himself within the provision of the 24 Geo. II., ch. 44-the only statutory law giving protection-is legally liable for the false imprisonment, &c.

Lastly, with respect to the sheriff. If the verdict against the gaoler

cannot be disturbed, a part of the same reasoning which applies to the gaoler, will be found equally applicable to the sheriff.

The first question, however, to be decided, will be—is the sheriff liable for the act of the gaoler as his servant? That he is, for a neglect of duty by the gaoler in criminal matters, cannot be disputed; but if in criminal, why not in civil? The sheriff has the superintendence of gaols; and by our act 32 Geo. III., ch. 3, sec. 14, he has the express right of appointment and dismissal of the gaoler, who seems to have been placed, in his relations with the sheriff, upon the same footing as bailiffs. The civil remedy, therefore, which would exist against the sheriff for the acts of his bailiff, should be equally in force against him for the acts of his gaoler.

But assuming, that the gaoler being liable at common law for this imprisonment under a void warrant—the sheriff, as a gaoler's superior, is equally liable-does it necessarily follow, that if the gaoler should be found by the court to be discharged from that liability under the statute law, the sheriff must be so too? The statute applies solely to inferior officers, such as gaolers and constables. And it is a well known rule in in the construction of statutes, that when an inferior officer is named in a particular clause, and the superior omitted, that clause cannot be taken impliedly to include the superior. Now no protection is given to a sheriff by the 24 Geo. II., ch. 44. He is not, therefore, within its provisions; and any argument which might prevail with the court, upon an examination of the statute, in inducing them to hold the verdict illegal as against the gaoler, will not, it is submitted, be of any weight in disturbing the verdict as to the sheriff. - Sewell on sheriff, 52; 5 Mod. 414; 2 Mod. 124; Latch. 187; Doug. 42; 2 T. R. 148; 3 Wils. 316; 11 E. R. 25; 2 N. & M. 426; 6 B. & C. 739; 8 B. & C. 598; 2 Ch. Gen. Pr. 61-64; 4 P. & D. 145; 7 Bing. 312; 5 M. & W. 194; 3 Burr. 1767; Arch. N. P. 305; 8 T. R. 191.

The verdict, therefore, being unquestionably legal with respect to the magistrates—and the gaoler and sheriff being legally responsible for their acts—it is submitted—that the verdict against all the defendants should be allowed to stand.

Adam Wilson in support of his rule.

No valid exception perhaps can be taken to the verdict as against the magistrates. But, as they have been joined in the same action with the gaoler and the sheriff, if the verdict as to them is illegal, the general verdict that has been rendered against all the defendants must be set aside, and a new trial granted without costs.

That the verdict is illegal—with respect both to the gaoler and the sheriff, seems to admit of but little question. And 1st. With respect to the gaoler. If the magistrates had been acting manifestly out of their jurisdiction, in entertaining the subject matter of complaint, upon which they had issued their warrant, so that the proceedings upon which the warrant was ordered had been void in their inception—it may be conceded—that the gaoler would be equally liable with the magistrates for any act done in obedience to such warrant.

In this case, however, the magistrates clearly had a general jurisdiction over the subject matter of complaint. They could properly adjudicate upon and punish for the assault alleged to have been committed. It is

true, that they have been irregular in the punishment they have inflicted—they should have fined in the first instance, and then imprisoned, if the fine within a certain time had not been paid. But the punishment, informal though it be, does not vitiate the whole proceeding, so that it can be said to be a perfect nullity, and of no force or validity in the hands of the officer with whom it had been placed for execution. The warrant, as it is, may be no defence to the magistrates who issued it—though a perfectly good defence to the bailiff who acted upon it.

Assuming, however, for the sake of argument, that at common law the gaoler is liable for an imprisonment as upon a void warrant, is he not protected by the 6th clause of the 24 Geo. II., ch. 44? Has not the conditi n, upon which protection is afforded by that act, been complied with, if not literally, at least in substance? The learned counsel has anticipated the case of Atkins v. Kilby, which it is submitted is a direct authority in favour of the gaoler.

The mere fact of its being mentioned in Atkins v. Kilby, on the delivery of a copy of the warrant, where the original was, can make no difference. If the plaintiff's attorney had asked the gaoler for the original, and he had refused it, or if the attorney had offered any objection upon receiving the copy, and had made it apparent to the gaoler, that he expected to see the original, and was satisfied with its non-production, there might then be some ground for drawing a distinction between this case and that of Atkins v. Kilby—as it is there is none—and if the court must be taken to have considered, that the circumstances in Atkins v. Kilby waived the positive requirements of the statute—the circumstances in this case must be held to have waived them also.

The plaintiff's attorney knew very well (at least he may be assumed to know) when he made his demand, that the original warrant must have been shewn him if he had wished it. It was not shewn to him simply because he did not choose to ask for it. Nothing can be more reasonable than that his whole conduct should be taken as a waiver of his right to a sight of the original, probably from an impression that the copy was an accurate one, and gave him all the information he required. If a party can in any case waive the liberal fulfillment of the terms of a statute in his favour, the present is certainly one in which it must be held, that the plaintiff fully intended to do so.

But what was the object in passing the 24 Geo. II., ch. 44? Was it not to give to the plaintiff the means of ascertaining who the superior officer was, by whom the warrant was issued, in order that he might have his remedy against him, instead of the inferior? Setting aside, therefore, all question as to the gaoler's protection, under the words of the 6th clause is he not, by the mere fact of the magistrate having been sued in conjunction with himself, fully protected under the general scope and spirit of the whole act 24 Geo. II., ch. 44? Does not this very suit shew the plaintiff to be in possession of the information which the production of the warrant was designed to give? It is submitted then that even if the common law, and the wording of the 6th clause of the act 24 Geo. II., ch. 44, were in favour of the gaoler's liability—still he must be discharged within the general intendment of the whole act, by the fact of the action being a joint one against the magistrate and himself.

Suppose then the gaoler discharged—What legal right can the plain-

tiff have to sue the sheriff? He can only be made liable constructively, through the gaoler as his servant. It is absurd therefore to argue—assuming the sheriff to be liable for the gaoler's act—that the same law which had been passed to exempt the gaoler, cannot equally exempt the sheriff, because, under the technical rule of construction mentioned by the learned counsel, the statute cannot be made to apply to an officer superior to the gaoler. That rule may be a good one and no doubt does apply, when it has a bearing upon distinct and independent officers, each liable for his own acts: but it does not apply to a superior, as in this case, whose liability is made to depend upon the acts of an inferior, whom he is supposed to represent.

But, independently of this consideration—the sheriff is not liable for the acts of his gaoler in ordinary civil matters. The gaoler is not dependant upon the sheriff in the same sense as a deputy or bailiff. He has an independant character well recognized in law. Commitments are directed to him; so are writs of habeas corpus. And it is submitted, that unless the sheriff takes himself a part in giving orders to the gaoler, he is not liable for his acts. Where a superior is liable, it must be that superior who has actually put the law in motion through the gaoler—as in this case the magistrates.—Holt's Rep. 22; 5 M. & W. 437; 11 A. & E. 777; 8 T. R. 178; 2 A. & E. 788; 1 Campb. 187; 11 A. & E. 813; 12 A. & E. 43.

There being, therefore, no pretence to sue the sheriff—and the gaoler being clearly exempted from all liability under the act 24 Geo. II., ch. 44—the general verdict given in this joint action against the magistrates, sheriff and gaoler—must be set uside without costs.

ROBINSON, C. J.—As regards the justices, there is no doubt the verdict is legal, and the damages are reasonable, as they ought to be in such cases, where there was no intention to do anything oppressive or wrong.

The warrant made by them could not be supported; for if they convicted under the statute for repressing riots at elections, which they probably intended to do, their conviction could not be upheld, there being no power given by that act to convict summarily. The party is left, for the offence specified in that statute, to be tried by a court, and that means of course by a jury.

Then, the conviction can no more be supported as one made by justices under the Summary Punishment Act, for an ordinary assault; because on a conviction so made, there could be no warrant to commit a person absolutely for thirty days, as the sentence might have been after a conviction by verdict of an assault at the time of an election, but only to imprison for thirty days, unless the fine and costs be sooner paid, which fine and costs should have been stated in the warrant.

An objection was made, which, if there were anything in it, would have availed these parties as well as the other defendants; namely, that the declaration, though it professes to be in trespass, does not lay a trespass, because it not only charges the defendant with causing the plaintiff to be assaulted, imprisoned, &c.; but clearly that is not a good objection. To cause another to be imprisoned—laying the act with force and arms, is to charge him with a trespass, for in trespass all are principals, those who procure and abet, as well as those who act.

Then, as there is no ground for disturbing the verdict against the

justices, and the application is only made on behalf of the other two defendants, we had a difficulty in setting aside the verdict altogether, without the justices either being called upon to shew cause against it, or signifying their assent to the application.

We could not grant a new trial as to some of the defendants only, and by granting it against all, they might be prejudiced, by being exposed to the chance of having heavier damages awarded against them on the second trial. We could not guard against that, by binding the plaintiff to agree to take no higher damages against them than the 101. already given, as was done in Price v. Harris et al., 10 Bing. 331, because it is not the plaintiff who is applying in this case, and we therefore are not in a situation to impose terms upon him.

Under such circumstances, if the defendants, against whom damages have been given legally, think it for their advantage to litigate the matter no further, they can pay their verdict and costs, which they are clearly liable for, and then there would be no longer any object for granting a new trial, except indeed as regards the costs of defence incurred by those defendants who may have been illegally convicted; but they should have the opportunity of exercising an option, by being called upon to shew cause against the rule obtained by the other defendants. They have in this case declared, that they do not object to the verdict being wholly set aside, and that removes the difficulty as regards them.

If the plaintiff had elected to release the sheriff and gaoler, and retain his verdict against the justices, then we might have avoided any interposition; but that course is declined.

I am of opinion, that the verdict against the sheriff and gaoler is contrary to law, and that there should, therefore, be a new trial without costs, since the plaintiff is unwilling to retain his verdict against the justices alone.

The liability of the sheriff must of course depend on the question, whether the gaoler is liable, for the sheriff is not pretended to have taken any part whatever in the matter, nor even to have had an actual knowledge of the imprisonment; he is only sued as being liable for the acts of the gaoler.

If, therefore, the gaoler is entitled to be acquitted, the sheriff must unavoidably be entitled to be acquitted also.

Now, that the gaoler is not liable in this case I am very clear, and that on several grounds:—

1. Because the justices had a general jurisdiction over the subject matter. They were acting within their jurisdiction, and he was bound as gaoler to receive the party, whom they had committed for an assault, although their proceedings may have been erroneous.—Watson on Sheriff page 54.

2. If they had even exceeded their jurisdiction, or rather, I should say, had been acting wholly out of their jurisdiction, in which case the common law would not have protected from an action the officer who obeyed their warrant, then the case of the gaoler would have come under the 24 Geo. II., ch. 44; and that statute in my opinion, would have protected them doubly in this case.

1st. Because if it had been necessary to shew (in order to avail himself of that statute), that he had complied with the demand made upon

him for a perusal and copy of the warrant, which I consider is not necessary, except where he is sued alone, then I think the case of Atkins v. Kilby, 11 Ad. & Ell. 777, would have applied; I mean in reason and principle, though the circumstances are not exactly the same, for I conceive that case to be less favourable for the officer than the present, as regards the compliance with the demand.

2ndly. I think, that under the 24 Geo. II., ch. 44, sec. 6, there is no question about the copy of the warrant, when the plaintiff has sued the justice jointly with the constable, but only where he has sued the constable alone.

And 3rdly. Since the plaintiff has not only sued the justices here as well as the gaoler (thereby showing that he knows who it was that set the officers in motion, and that he has the information, which it was the intention of the statute to secure to him,) but has actually recovered against the justices, by proving the very warrant under which the gaoler acted, it follows, as a necessary consequence, that the gaoler, thus shewn to have done nothing more than act in obedience to the justices' warrant, must be acquitted.

I consider it to be not only contrary to reason, but contrary to the express words of the 6th clause, that a plaintiff should recover in the same action, and as for a joint trespass, against the justices who made the warrant, and the officers who did nothing more than obey it. The very proof that gives a right to a verdict against the one, in my opinion inevitably discharges the other.

The several points involved in this case are interesting, and 1 am prepared to shew on what reason and authority I have come to the opinion which I have expressed. But, as the same points, or some of them, may probably come up for discussion after the new trial, I do not go further into them at present.

MACAULAY, J.—The first question is, whether the sheriff is liable to this action, by reason of the imprisonment of the plaintiff by the gaoler, and the most satisfactory opinion I can form is, that he is not so liable.

The district gaol is no doubt under the superintendence of the sheriff, and he appointed the gaoler; and in 4 Co. 34, it is said, the sheriff should put in gaolers for whom he will answer.

But, although the sheriff is responsible for the gaoler's breach of neglect of duty, in relation to prisoners lawfully committed on criminal warrants, I do not find that he is so responsible for the illegal detention of parties on illegal warrants, of which he has no notice.

The gaoler, though in a qualified sense the servant of the sheriff, (Impey, 48 & 51,) is recognized as a public officer; he is paid a salary as such. Commitments and writs of habeas corpus are directed to him as such; so that he often acts independently of, and not always through and under the sheriff, as his ordinary deputies and bailiffs do. In this case the commitment is from two justices of the peace, not the sheriff, and it is directed to the gaoler on the principle of respondent superior; therefore the justices, and not the sheriff, are the parties to answer to the plaintiff. The sheriff did not superadd his authority to that of the justices; if he had done so, he would no doubt be equally liable; but, in my humble opinion, the sheriff is not liable in trespass on commitments by magistrates directed to the gaoler, that turn out to be informal

insufficient, unless he in some way be made a party to the imprisonment, as by directing or approving of it, or otherwise becoming privy thereto.

No such privity is shewn here, and I apprehend the plaintiff was detained on the responsibility of the magistrates, and not of the sheriff, and on this ground, I think, he should be acquitted.

As to the gaoler, if the warrant is on the face of it a sufficient justification to him, though not for the justices, he is of course entitled to the benefit of that defence, and so would be the sheriff, if deemed responsible through him. I have not, however, been able to satisfy myself that the warrant affords him a protection.

No doubt the justices had jurisdiction over the subject matter, id est, the assault and battery, and they might have committed the plaintiff for the period mentioned conditionally, i. e., provided he did not sooner pay the fine (not exceeding 5%) imposed upon him under the 4 & 5 Vic., ch. 27, sec. 27, if any such fine was imposed, but they had no authority, for such an offence, to sentence or commit him to prison unconditionally for thirty days. If there was a conviction, and if the punishment awarded thereon was thirty days imprisonment, as the commitment imports, the statute above mentioned did not authorize it, for it only enables the justices to fine, and then, if not paid, to imprison for a period not exceeding two months, unless sooner paid, and no other act sanctioning it has been referred to. It was, therefore, a clear excess of jurisdiction; and a commitment for thirty days absolute, because the plaintiff had been convicted of an assault and battery, seems to me void on the face of it.

In Hill v. Bateman, 3 Stra. 710, the commitment may have been, and probably was, conditional only, or only objectionable because the magistrate issued it without first endeavoring to levy the penalty on the party's goods, he having sufficient goods to satisfy the same.

If not a good commitment to justify the gaoler, still he is within the protection of the 24 Geo. II., ch 44, sec. 6. Butt v. Newman, 3 Camp. 35, Gow. 97; and I think the case of Atkins v. Kilby, 9 Law. Jour, 52, and 11 A. & E. 777, warrants me in holding the delivery of a copy of the warrant, under the circumstances in evidence, a sufficient compliance with the statute on that head.

The act seems to require the constable to grant a perusal of the warrant, with the opportunity to the applicant to take a copy. Here the gaoler made the copy himself, and delivered it to the plaintiff's attorney, who received it without objection, or insisting on a sight of the original. Had he required a perusal, or rejected the copy without it, the gaoler might have produced and shewn the warrant before action brought; and had he done so, though after the expiration of six days, it would have been sufficient.—5 E. 445.

It was not a literal, but substantial compliance with the act, and sufficient, I think, to entitle him to the benefit thereof. If the plaintiff's attorney did not intend to waive the demand of a perusal of the original, he should have said so, and rejected the copy as insufficient. It cannot be said, that the perusal and copy were refused or neglected for six days after demand thereof, for a copy was given, though a perusal was omitted or neglected.

As to the sheriff, if responsible for the act of the gaoler and equally liable, he should be entitled to an equal privilege, being made liable only

through him. No demand was made upon him, but the copy served by the gaoler should enure to his benefit, and on that ground he is equally entitled to acquittal. It is, as to the gaoler, a justification, and if he is justified, the sheriff cannot be made a tresspasser by construction.

It may be said, that the sheriff, being a higher officer than the bailiff or constable, is not embraced by the act; but it would be most unreasonable to hold him liable constructively through the act of the gaoler, and not entitled to the benefit of exemption enjoyed by such gaoler.

I am not satisfied that the mere circumstance of the gaoler and sheriff being joined with the justices in the action, of itself entitles them to acquittal on production of the warrant, when a perusal and copy of the warrant have been demanded, and not duly granted; on the contrary, I am disposed to think the mere joinder of the magistrates does not entitle the constable to acquittal, if he had neglected or refused to give a perusal and copy of the warrant on demand made.

My opinion is rested upon a compliance with such demand, in so far as not impliedly waived by the plaintiff's attorney.

I cannot say I am free from doubt, as to the sufficiency of the gaoler's compliance with the requirements of the statute on this occasion, and only adopt that opinion I have expressed, in reliance upon the case of Atkins v. Kilby, which, though not precisely similar, appears to me to warrant a similar view in this case.

There the bailiff exhibited or gave a perusal of a copy only, of which copy the plaintiff's attorney took a copy. There is this distinction, that there the gaoler stated where the original was, here he did not; but so far as a sight of the original was material, in order to enable the plaintiff to prove it against the justices, if not produced on notice, or under a subpæna duces tecum, the cases are alike. And here the copy being delivered, as if the original in the gaoler's hands, it was accepted without objection; and it is not pretended that it was not a true copy thereof, or that the omission to shew the original occasioned any additional difficulty to the plaintiff, in proving its issue by the justices whose names are signed thereto.

JONES, J., concurred in granting a new trial.

McLean, J., being in the Practice Court during the argument, gave no judgment.

DRAPER, J., absent in England.

Per Cur.-New trial without costs.

KING'S COLLEGE V. DENISON.

The King's College cannot recover for tuition given in "Upper Canada College" before the passing of the statute 7 Will. IV., ch. 16 (1837.)

It is no objection to the right of "King's College" to sue for tuition given after the paising of the act 7 Will. IV., ch. 16, in "Upper Canada College," that professors to "King's College" had not, during the time sued for, been appointed.

The Chancellor, President and Scholars of King's College at York, in the province of Upper Canada, sued the defendant in assumpsit, setting forth, that he was indebted to them in 1002, for the work and labour, care, diligence and attendance of plaintiffs, their servants and teachers, in instructing divers persons in reading, &c., at request of the defendant, and for books and other things by plaintiffs found, provided and employed in and about such teaching and instruction at defendant's request; and for meat, drink, washing, lodging and necessaries, by the plaintiffs found and provided for the said persons at defendant's request; and thereupon defendant, in consideration thereof, promised to pay to plaintiffs, yet hath not paid, to plaintiffs' damage, &c.

Defendant pleaded: 1st. Non-assumpsit.

2ndly. Actio non accrevit infra sex annos, on which issue was joined.

The plaintiffs' claim was for tuition and books, furnished to defendant's sons in Upper Canada College, 73l. 7s. 1d. with six years' interest, being, for college dues and books to Christmas, 1835, 67l. 17s. 5d.; the same, from 24th Sept., 1837, to 28th March, 1839, 15l. 9s. 8d.; interest charged in addition, 26l. 8s. 1d.

It was proved at the trial, that defendant had, within six years, admitted that he owed the Upper Canada College for tuition of his sons, but said he had made some payments.

One of his sons swore, that he had found some receipts which ought to be credited, but he did not produce them; he said he thought from 81 to 121 should be deducted as paid.

But it was objected, that plaintiffs could not maintain this action; 1st. Because no professors had been appointed to Upper Canada College until after all this debt was alleged to have accrued (which is admitted to be the fact), and so there could be then no such corporation then existing, as that which was here suing.

2ndly. That, at all events, this corporation could not recover for any debt due to Upper Canada College, before the statute 7 Will. IV., ch. 16, was passed, which incorporated Upper Canada College with the University.

The learned judge over-ruled the objections, giving leave to defendant to move to enter a nonsuit on the ground of the first objection, or to reduce the verdict on account of the second.

The jury found 57l. 17s. 4d. due before Christmas, 1835, and 15l. 9s. 8d. since September, 1837, and six years' interest on both sums.

G. Denison moved on the leave reserved at the trial; he renewed his objections taken at the trial, and relied altogether upon the 7 Will. IV., ch. 16.

H. Eccles shewed cause.

He contended that there was nothing to shew that the 2nd clause of the 7 Will. IV., ch. 15, incorporating Upper Canada College with King's College, restricted the right of suit to King's College for tuition in Upper Canada College, given subsequently to the passing of that act; that the appointment of professors was not necessary to the existence of a corporation, and could in no way affect this claim.

Robinson, C. J., delivered the judgment of the court.

We are of opinion, that the plaintiffs clearly cannot recover on this record, for tuition given in Upper Canada College before the passing of the statute 7 Will. IV., ch. 16, because it was that act which first established any connection between the Upper Canada College and the

University; and it cannot be held to be true, as stated in the declaration, that these plaintiffs (that is, King's College) had, before 1837, instructed this defendant's sons.

With respect to the amount 15%. 9s. 8d., claimed for tuition given since Upper Canada College was incorporated with the University, and made subject to its jurisdiction and controul, that stands on a different footing and we see no good ground on which the right of King's College to recover for that part of the demand can be denied.

As to no professors having been appointed to the University till after these services had been rendered, that can form no leading obstacle to the corporation suing. The corporate body existed before any professors were appointed, as well as after, and power to sue was expressly conferred upon it.

Per Cur.-Verdict to be reduced.

SHERWOOD V, GIBSON.

In actions of tort, where the defendant has had a verdict, and the damages are but small, it is always with reluctance that the pourt will grant a new tria; they will only do so where the ordinary rights of property seem to have been lost sight of

Trespass quare clausum fregit.

. Second count, for cutting and carrying away timber.

Plea, general issue.

The action was for cutting and carrying away 37 pieces of elm timber, the value of which was between 51. and 101.

It was clearly proved, that defendant's sons, living with him, had cut down the trees on plaintiff's land, which joins the defendant's and that the defendant drew the timber away and sold it.

It did not appear clearly, whether the defendant, when he cut these trees, knew that they were on the plaintiffs land; he may have been ignorant of the right boundary between the plaintiff's land and his own; but it was proved, that he was aware of the fact before he sold the timber, and that being sued for the trespass, he went to the plaintiff's attorney and offered to pay 101. for the trespass, or rather to give his note for that amount.

Being required to pay the costs of the action also, and to find some one to go security with him for the payment of the 10% he declined, and this suit was proceeded in.

The jury were directed, that the trespass was clearly proved, and that the plaintiff was entitled to reasonable damages, but they found a verdict for defendant.

J. H. Hagarty obtained a rule for a new trial on the law and evidence. This is a very plain case. The verdict is wholly against the evidence. There might be some doubt as to whether the defendant knew the right line of division between himself and the plaintiff, at the time the timber was cut; but there can be no doubt that he was well aware that the timber had been cut on the plaintiff's land, before he drew it away and sold it; he himself admitted it, and offered to give 101. for the injury he had done; and the action was brought because he could find no security for

the payment of the 10%, and would not pay in addition for the costs the plaintiff had incurred.

P. M. Vankoughnet shewed cause.

The evidence does not shew how much of the timber was cut on the plaintiff's lot, and how much on the defendant's; the lots are adjoining, there is no fence between them, and there always has been an uncertainty as to the precise boundary line. It cannot therefore be said, under the evidence, that the timber of the plaintiff was cut at all; but if it was, it was not the defendant who cut it, but his sons. He might, therefore, be liable in trover, but not in trespass.

As to the offer to pay 10*l*, he might do that to save his sons from trouble, without intending to acknowledge in any way the plaintiff's claim. ROBINSON, C. J., delivered the judgment of the court.

It is always with reluctance that a new trial is granted in actions of tort, when the defendant has received a verdict, and when the damages in question are small; but the ordinary rights of property seem to have been lost sight of in this case.

The case was a perfectly plain one; the defendant was shewn to have committed a depredation on plaintiff's property, not insignificant, though not to a large amount—he had acknowledged it before the trial. It was plainly proved by the testimony of witnesses, and was not attempted to be disproved.

The defendant did once make an offer to settle; he was not reasonable in refusing to pay the costs of the action that had been incurred, and which probably at that time were trifling. And he did not tender any satisfaction, nor even secure the payment of the sum which he was willing to give his note for. If he was ready to pay a reasonable compensation in order to save an expensive suit, he should have tendered amends before action, or paid money afterwards into court.

As the case stands, the verdict being wholly against evidence and law, the facts being clear and undisputed, the action not a hard one, and being brought in order to obtain compensation for property wilfully taken from the right owner, and appropriated to the defendant's use, we think there should be a new trial without costs.

Per Cur.—Rule for new trial absolute without costs.

SMITH V. DISSITS.

It is only in very clear cases that the court will exercise their jurisdiction in setting aside a plea of release, on the ground of fraud.

In this case a motion was made by *P. M. Vankoughnet* to set aside a plea of release given by plaintiff, as fraudulently given by collusion with the defendant in order to defraud one Samuel W. Brady, the person benefically interested in this cause, being the assignee of the agreement sued upon.

The agreement was a very special one under seal, made 9th July, 1844, on dissolving partnership between plaintiff and defendant, containing various stipulations on both sides. And it was agreed by it, that defendant should pay plaintiff 250*l*. in certain instalments, which were payable to plaintiff, his executors, administrators or assigns.

Brady swore that he bought this agreement from plaintiff in January

or February, 1846, and took an assignment of all the covenants (some of which were not of a nature to be assigned); that he sued soon after for such instalments of the 250% as were due; that he recovered judgment for 75% in Smith's name; that no release was pleaded to that action, though defendant well knew that Brady was the person beneficially interested.

The release was executed in April, 1846. The assignment was said to have been given in April, 1846, and is now lost.

P. M. Vankoughnet cited, in support of his rule, 10 Jurist, 295; 15
 M. & W. 304; 1 B. & P. 147; 5 Dowl. 63.

Kirkpatrick, of Kingston, Q. C., shewed cause. He contended that the court must at once see, upon an examination of the affidavits, that this was not one of those manifestly clear cases in which they could summarily interfere to set aside a plea on the ground of fraud. The English authorities, and one in our own court, have decided, that nothing short of this palpable fraud will induce the court to give way to a motion of this kind.—Waltenberger v. McLean, 4 U. C. R. 350; 11 M. & W. 84; 5 Bing. 688; 2 C. & M. 384; 2 Dowl. 322; 4 Moore, 192.

ROBINSON, C. J., delivered the judgment of the court.

Having read all the affidavits and papers, we are clear that we ought not to interfere with the plea of release.

The agreement between Smith and Thomas Dissitt, on the dissolution of their partnership, was one of a very special nature; and though it did contain a plain covenant to pay certain sums of money as well as other covenants, and though that covenant, if it stood alone, could conveniently be assigned, yet the agreement, taken as a whole, was very unfit to be assigned, as any one conversant in business would know. It could not be assigned in part, and was not pretended to be so assigned.

It is clear from the affidavits, that Brady did not in fact purchase it in the sense that one purchases a bond or other securities for money; but that he got it into his hands for some very inadequate consideration.

The statements he now advances, respecting Smith's habits, and his readiness to sign releases or anything for a few shillings, are enough to throw suspicion upon the fairness of the assignment taken by Brady of this instrument itself; and Brady's affidavit, and the account he has rendered, shew clearly enough, that he cannot pretend to say, that Smith really parted with all his interest under the agreement to him.

The charges in his own account rendered, shew that he was acting for Smith rather than for himself, in trying to collect money on this agreement. It is manifestly a trumped-up account, to make as large a claim as he can to be paid out of the proceeds, and he admits that he holds himself accountable to Smith for all, that may exceed what he has advanced to him.

Then, the defendant's account, and Smith's annexed to it, written in 1845, go far to exempt the release given in 1846 from being subject to the imputation of fraud.

It is only in clear cases that we can exercise this kind of discretion, in setting aside a plea of release.

DOE DEM. DEANE V. HENDERSON.

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. poss., and the plaintiff afterwards quietly relinquishes that possession, in consequence of hearing that an injunction had issued from the Court of Chancery; Held. per Cur., that upon the injunction being dissolved, they could not grant the plaintiffs an alias writ of possession.

Kirkpatrick, of Kingston, Q. C., moved for leave to take out an alias writ of habere facias possessionem in this case.

Judgment being entered for the plaintiff, a writ of "habere facias possessionem" was issued on the 13th of June, 1846, which was delivered to the sheriff on the 16th of June, at Kingston. On the same day an injunction against any further proceedings in this cause, issued from chancery; but plaintiff's attorney being absent from Kingston, the fact of the injunction being ordered was not known in his office when the sheriff, on 17th June, gave possession to the agent of the lessor of the plaintiff under the habere facias possessionem. As soon as it became known at Kingston that the injunction had issued, the possession was abandoned by the lessor of plaintiff, and the defendant resumed possession and still holds it.

No return had been yet made to the writ of hab. fac. poss.

On the 12th of October, 1847, the injunction was dissolved, and in Michaelmas Term plaintiff made this application, and obtained a rule nisi. He cited in support of this rule, Doe Peak v. Roe, 2 U. C. R. 27; 9 Dowl. 971; Keble, 779.

P. M. Vankoughnet shewed cause, and filed an affidavit, setting forth, that the injunction had been suffered to be dissolved without opposition on his part, because this action having been commenced upon demises of this lessor of the plaintiff, and also of one Anderson, and a bill having been filed in chancery to obtain an injunction against further proceedings in such action, Deane, in his answer, set forth that the lessor of the plaintiff had been obliged to discontinue the action in consequence of some mistake in conducting the same; and that they could not, as they were advised, bring a new action until the injunction should be dissolved; that the lessor of the plaintiff in this case took out an order nisi to dissolve the injunction; and that the defendant's solicitor for the tenant in possession, considering, that before judgment could be obtained, and execution issue in a new action, the suit in chancery would most probably come to a hearing, and a decree be obtained which would dispose of the action of ejectment, allowed the injunction to be dissolved without argument.

He referred to I Taunt. 55; 2 Dowl. 200.

The lessor of the plaintiff met this statement, by saying that there was no discontinuance of the action, nor any intention to discontinue, but that at the trial, owing to the absence of a witness, the title of Anderson, one of the lessors, could not be made out, and, so far as regarded his interest only, the action was abandoned, and a verdict taken on the other demise; and that the statement in answer to the bill referred only to that.

ROBINSON, C. J., delivered the judgment of the court.

We think we should not be warranted in making this rule absolute.

The case in this court of Doe dem. Peck v. Peck 2 U. C. R. 27, has been relied upon, but there the defendant acted in contempt and defiance of the court and its process, here the lessor of the plaintiff, whether necessarily or not, relinquished possession in order that the defendant might enter.

The hab. fac. poss. had been executed, and the object of the ejectment had been answered, and the defendant did not regain possession by acting in any manner in opposition to this court or its process.

For all that we see, the injunction might have been granted for causes which afterwards ceased to operate.

The ejectment may have been brought contrary to good conscience, and the plaintiff may have obtained the judgment of which the *habere facias* is the fruit, by bringing an action which at that time he ought not to have brought.

But at all events, after the lessor of the plaintiff had been put in possession under the writ, and has voluntarily relinquished possession, and the defendant has entered, as it was intended by the plaintiff he should, and has kept possession for more than a year, it seems to us to be out of the question, that he can be summarily dispossessed under an alias habere facias upon the same judgment, which would be executing the judgment a second time. Besides, it is a most material objection to such a course, that the injunction only dissolved in consequence of the lessor of the plaintiff having led the tenant to believe, that this action was not intended to be further proceeded in.

McLean, J.—I declined giving any order in chambers in this case, no precedent being produced for such a proceeding, and this case not being one in which possession had been taken by violence, or in contempt of the process of the court.

The case in this court, Doe Peck v. Peck, was one of the latter description. The defendant had expected to obtain what he desired in consequence of alleged irregularity, but when disappointed in this expectation, and immediately on the judgment being pronounced, he entered into the premises, expelled the lessor of plaintiff, and kept her out of possession.

In the present case, however, the possession was abandoned under a supposed necessity in consequence of the injunction, and the defendant did nothing but re-enter, as he was at liberty to do, and in the same manner as any other person might do, into premises which had been abandoned and were vacant.

It is stated by the court, in the case of Doe Pate v. Roe, 1 Taunt. 55, that after possession once given under a writ, the plaintiff cannot sue out another writ of possession, though he be disturbed by the same defendant, and though the sheriff have not returned the former writ. In that case, the court denied the authority of the case, Radeliffe v. Tate, Keble, 779, and said, that the sheriff ought to have returned that he had given possession, and the plaintiff could not afterwards have had another writ. An alias cannot issue after a writ is executed. If, then, the right of the court to issue an alias writ of habere, where violence has been used in defeating the judgment of the court, is in any respect doubtful, it must be still more so in a case like the present, where the lessor of plaintiff has quietly relinquished possession in order that defendant might enter, and has left them open for that purpose.

The plaintiff, if the costs of the ejectment have not been levied, may be entitled to an alias fi. fa. for the recovery of the amount, as that is a subsisting demand, and that part of the judgment of the court remains yet unsatisfied; but, as the defendant must now be considered in possession, precisely as if he were a stranger, I do not see that we can interfere with his possession.

JONES, J., and DRAPER, J., concurred.

Per Cur.-Rule discharged.

RUTTAN, SHERIFF, &C. V. SHEA.

An action on the case lies in favour of a sheriff against a bailiff for negligence in allowing a prisoner to escape, ir consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages; and semble, that in such action, the sheriff is allowed to recover both the costs of the action against himself, and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the bailiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name.

Under the plea of not guilty, the bailiff can only prove that he was not guilty of the negligence. He cannot give in evidence any special contract of service.

The plaintiff sued the defendant in an action on the case, for negligent conduct, when employed by him as a bailiff to execute a writ of capias ad respondendum, in a case of Butler, plaintiff, v. Graves, defendant; the charge was, that the defendant did arrest the debtor, and allowed him to escape, whereby the plaintiff had suffered damage, by having judgment recovered against him in an action for the escape.

It was proved, that the defendant, having received a warrant to execute the *capias*, did arrest Graves, but suffered him to escape, in consequence of which the sheriff was sued by Butler, and a verdict was recovered against him for nominal damages only, but which subjected him to the costs of the action.

The defendant in this action pleaded the general issue only.

The case, as regarded the arrest of Graves by the defendant, the suffering him to escape by negligence, and the recovery against the sheriff in consequence, was proved; but it was objected, that the defendant being employed by the sheriff as his servant to perform the particular duty, the action should have been in assumpsit, for not fulfilling his undertaking, and not case, as if grounded on a general duty.

And 2ndly. That there was, at any rate, no right to recover for the costs, for that the sheriff, being sued by Butler for the alleged default of this defendant as his bailiff, had not given notice of the action to the defendant, so as to afford him the opportunity of defending it, but had taken the defence upon himself, and had pleaded, denying the arrest, and in another plea denying the escape.

The learned judge allowed the case to proceed, and plaintiff recovered a verdict for 31l. 6s. 6d., being the amount of costs taxed against the plaintiff in the action for the escape, and of his costs of the defence, with 1s. damages.

It was proved, that this defendant, Shea, was examined as a witness-

for the plaintiff in the action for escape, and all that he had to state, in regard either to the arrest or escape, was heard by the jury.

R. P Crooks moved for a nonsuit on the leave reserved, or for a new trial on the law and evidence, and for misdirection, or to reduce the damages by striking out the amount of costs. He renewed the objection taken at the trial, and cited 7 Taunt., 153; 3 C. & P. 467; 9 B. & C. 618.

P. M. Vankoughnet shewed cause. He contended that case was the proper remedy—5 T. R. 145; 5 B, & C. 589; 3 E. R. 62; 2 M & W. 601; 3 B & Ad. 408—and that the sheriff could recover the costs of the former trial, notwithstanding he had given no notice thereof to the bailiff.—1 Star, 245; 7 Bing. 217; 14 E. R. 565; Law Times, Dec. 4, (1848), page 185.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff is entitled to sue in this form of action. The duty arises out of and is imposed by the contract but it does not therefore follow, that the sheriff could sue in assumpsit alone.

Whatever a person, in any branch of business or employment, engages to do for another, he is bound in duty, in consequence of his employment, to do it carefully and well; and if, by his negligence and want of skill, he occasions injury to his employer, he commits a breach of duty, for which he is liable in a special action on the case, as for a wrong.

The defendant endeavoured to shew at the trial, that he only undertook to execute the process upon the understanding with the deputy-sheriff who gave it to him, that he was not to be liable for accidents, but was only to do the best he could.

If that defence had been open to him upon the pleadings, I cannot say that the evidence of the deputy-sheriff clearly established it, for the reasonable construction to give to the stipulation as he expressed it was, that he, as bailiff, should not be liable where he was not actually in fault, though the sheriff, to his misfortune, sometimes is so liable.

But the jury could hardly, I think, have considered that there was no fault in the bailiff, when he was proved to have admitted, that he allowed his prisoner to go on with some work of his own out of doors, after he had submitted to the arrest; and that while he, the bailiff, stood some distance off talking to a friend, and with his back to the prisoner, the prisoner took advantage of the opportunity and escaped; and the bailiff imprulently gave him this opportunity, though he was under the impression, as he himself stated, that the prisoner was a difficult person to take care of.

The defendant must have been either afraid to appear watchful of his prisoner, or he neglected to be so in fact, and, at any rate, the defendant having pleaded only that he was not guilty of the negligence, in other words, that he did not suffer the escape charged, he could not take advantage of any such special contract of service as he alleged.

The costs of the former action, both those taxed against the sheriff, and his own costs of defence, were rightly recovered, we think, on the trial of this cause. This is not like those cases where a plain debt is claimed of one man, for which another is liable over to him when he pays it, in which cases the costs are not allowed, because the first party should have paid the debt without incurring the costs of an action.

Here, the action of the sheriff being in tort, it could not be known till the case was tried, what damages the jury would think it right to give. The sheriff defended himself in the hope of being able to shew, that the plaintiff in that action, Butler, had sustained little or no damage from the escape, from the particular circumstances of the case, and he was successful in this, for the jury gave only a verdict for 1s.

If it could be said, that the defendant in this case had no notice of the proceedings against the sheriff, the only effect of that, I conceive, would be, that he was at liberty, on the trial of the case against himself, to dispute the grounds on which Butler recovered against the sheriff. He might have shewn, if he could, that he never arrested Graves, or that Graves did not escape, or that the sheriff was on any ground liable. The former verdict would not be conclusive upon him, if he had no opportunity for defending at the trial in the sheriff's name.

But the fact in this case was, that the defendant was not held to be concluded by the former verdict, but was allowed to defend his conduct to the utmost in the action against himself; and upon the action against the sheriff, he was actually examined as a witness, and had a better opportunity than he could have expected under such circumstances, of shewing himself free from all blame, for he was heard on oath as a witness in a cause wnich was in fact his own; and the case was before the jury upon such pleadings as admitted of a verdict in favour of the sheriff, if there had been no negligent escape.

Per Cur--Rule discharged.

WILSON V. GILMOUR.

Where in an action on the case for a malicious arrest, the plaintiff's attorney served the defendant's attorney with a notice "to produce the writ of ca. re. issued, &c., at the suit of A. against the defendant in this cause;" Held per Cur., that the notice was sufficient to let in secondary evidence, the mistake in using the word "defendant" for "plaintiff" being a mere clerical error which could not mislead.

Case for maliciously holding plaintiff to bail for 1672l. 3s. 10d., not having any reasonable or probable cause for believing and not believing that he was about to leave for Upper Canada with intent to defraud this defendant of the said debt.

Plea not guilty.

Before the trial a notice was served by the plaintiff's attorney on defendant's attorney, to produce on the trial "a certain writ of capias ad re-"spondendum, issued out of the Queen's Bench on or about 4th Jan., 1847, at the suit of Allan Gilmour, (and the other members of the firm, "naming them,) against the defendant in this cause and one William "Graham, in a plea of trespass on the case upon promises, directed to, &c., "and returnable on, &c."

This notice was entitled "In the Queen's Bench, Archibald Wilson, plaintiff v. Allan Gilmour, defendant."

The plaintiff's attorney swore at the trial, that when he served the notice, he informed the defendant's attorney that it was a notice to produce the writ in the suit of Gilmour et al. v. Wilson and Graham.

The defendant did not produce the writ on which the arrest was made,

and, relying on the defect in the notice, objected that plaintiff could not give secondary evidence of it.

The learned judge, however, held the notice sufficient, as the defendant's attorney could not have been misled; and the writ was allowed to be proved by secondary evidence.

Verdict for the plaintiff, 100l. damages.

S. Richards obtained a rule to enter a nonsuit on the leave reserved at the trial, or for a new trial on the law and evidence, and for the admission of improper evidence; also upon the discovery of new evidence, and for excessive damages.

P. M. Vanoughnet shewed cause.

There is no ground for a nonsuit. The inserting the word plaintiff for defendant, when it is quite clear what is meant, is a mere clerical error, in no way affecting the regularity of the notice. Nobody is misled by it.—1 Campb. 440. Besides, a verbal notice would have been sufficient, and that was given,—14 M. & W. 250.

There is no ground for disturbing the verdict on the law and evidence. The case went fully to the jury, and upon a charge by the judge not objected to.

Richards in support of his rule. He contended that the mistake in the notice was of importance—that it rendered the notice insufficient—and precluded the plaintiff from secondary evidence.—2 Stark. 17; 8 Jurist, 178; 1 Dow. & Low. 599. That a verbal notice would not do after the plaintiff had given a written notice: he must then be bound by that.—2 Stark. C. 70; 9 Bing. 333.

With respect to the evidence. No one can doubt that the creditor in this case had every reason to believe that his debt would have been lost, had he not resorted to an arrest. If the conduct of any debtor can be considered suspicious enough to warrant an arrest, the facts given in evidence certainly shew this man's conduct to have been so. No creditor can be safe, if a debtor can succeed in making him pay heavy damages for an arrest, in the face of evidence of leaving the creditor really no alternative but to arrest, if he ever expected to be paid his debt.

Supposing, however, the jury to have been warranted in finding for the plaintiff upon the evidence, it is submitted, that some of the evidence received should have been refused. Witnesses, in cases of this kind should not be allowed to state to the jury whether they thought the plaintiff was a person likely to abscond—yet this question was put at the trial, and answers given, which may have had great weight with the jury.—7 A. & E. 330; 4 A. & E. 53.

ROBINSON, C. J., delivered the judgment of the court.

With regard to the objection to the notice to produce, we think it ought not to prevail, for it was a mere clerical error, which could not have deceived the defendant's attorney, and that the learned judge at the trial did right in receiving the secondary evidence.

But, on a consideration of the evidence, we think that justice requires that the case should receive another investigation at the hands of a jury.

The evidence of probable cause for the arrest was strong, the debt was large, and the conduct of the debtor was shewn to have been such as to expose him to great suspicions.

If a creditor, arresting under such circumstances as were proved on

the trial, is liable to be treated as acting from malice, and without grounds for arrest, and to be condemned in heavy damages as a malicious wrong-doer, I really do not see when a creditor is to consider himself safe in holding his debtor to bail; it would be better that all power to arrest for debt should be withheld.

Per Cur. - Rule absolute on payment of costs.

DOE DEM. MAITLAND V. MARY ANNE DILLABOUGH.

A defendant in ejectment cannot first put the plaintiff to the proof of his title, and then—failing in this defence—secondly, claim a right to notice or a demand, as if he were in possession under him. He must decide whether he will claim adversely to, or in privity with, the title—he cannot do both.

Ejectment for south-east quarter of Lot No. 21 in the first possession of Montague.

A patent was produced, dated 30th June, 1801, to John Chester, for south half of No. 21.

At the trial, the plaintiff being unable to produce the conveyance from John Chester to him, gave secondary evidence of it, first proving it to have been in the possession of this defendant, on whose attorney a notice to produce had been served.

The defendant's counsel raised objections to the sufficiency of the notice, and contended, that the deed was not clearly shewn to have been in the possession of this defendant. These objections were overruled.

It was then proved, by a witness called on the part of the plaintiff, that he was present when the lessor of the plaintiff demanded possession of the premises in question from the defendant, or a settlement, and that defendant said she would do all in her power to settle.

This was found to have taken place in June, 1846, and it did not appear by the record that it was before action brought.

The defendant's counsel then objected, that as the plaintiff's counsel had stated on opening his case, that the defendant's husband had been allowed to go into possession under an agreement to purchase, the defendant must be treated as tenant at will, and so entitled to notice, or demand of possession, before she could be treated as a trespasser.

The learned judge ruled otherwise, but reserved leave to defendant to move for a nonsuit on that point.

D. B. Read moved for a nonsuit on the leave reserved at the trial.

He contended that there was no proof, that the husband had been in default as a purchaser, and that unless that was the case, he had a right to the possession, and his widow an equal right.—I Campb. 39, 310; 6 Jurist, 266; 13 E. R. 210; 11 E. R. 56; 3 M. & R. 111.

G. A. Phillpotts shewed cause.

The cases of Doe Kemp v. Garner, 1 U. C. R. 29, and Doe Lemoine v. Vancott, Hilary Term, 7 Will. IV., are in point to shew, that this defendant, as the widow of an intended purchaser, has no right to the possession, and that an action can be brought against her, without a notice or demand of possession.

The defendant, however, in this case has disabled herself from acting up the defence of a want of notice. If she had intended to defend herself on that ground, she should not have put the plaintiff to the proof of

his title. She cannot first dispute his title, and then turn round and admit it, by calling for proof of notice, &c.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the rule must be discharged. The cases of Doe dem. Kemp v. Garner, and Doe dem. Lemoine v. Vancott, are both decisions in this court in favour of the plaintiff, to shew that the defendant could not insist upon the necessity of demanding possession under the circumstances.

The defendant shewed no privity of title. The husband was in possession as an intending purchaser, but, whatever may have been his position, it is not shewn that she holds in the same right.

If she has any equitable title she may have relief in equity, or if any grounds can exist, which would warrant this court in restraining the plaintiff from proceeding in his ejectment, she should have shewn them. But she shows nothing to oppose to the clear, legal title of the plaintiff; and she had, besides, disabled herself from insisting on a right to notice or demand of possession, by putting plaintiff to proof of his title on the trial, and raising objections, as a stranger might have done.

This was in effect disclaiming to hold by his permission, and it would be inconsistent to allow the defendant first to raise vexatious objections to plaintiff's title, and then, failing in these, to claim a right to notice as if she were in possession under him, for in that case she could not be allowed to dispute his title. It is a clear principle, and one important to be preserved, that a defendant cannot adopt this double mode of defence.—Bull. N. P. 96 (note).

Per Cur.—Rule discharged.

DOE DEM. SIMPSON V. LOUIS J. PRIVAT.

A., the assignee of certain leasehold property, makes an assignment to B., upon the understanding that he is to hold the property only as his agent, till his return from the United States. A. returns, and directs B. to assign the lease to C., which he does D. having an execution against the goods of A., purchases at the sheriff's sale, A.'s interest in this lease: Held, per Cur., in an action of ejectment brought by D. to recover possession from C- that A. had no estate which could be sold by the sheriff—and that a verdict should be entered for the defendant, C.

Ejectment for land in the city of Toronto.

Plaintiff made title as purchaser at sheriff's sale, under a fi. fa. against goods on a judgment at his suit against Louis J. Privat (not this defendant), under which writ all the interest of Louis Privat, the judgment debtor in the premises in question, was sold and conveyed by sheriff's deed, 21st February, 1846.

To shew what that interest was, and that it was such as could be sold and conveyed as a chattel interest under a \hat{n} . \hat{fa} . against goods, the plaintiff proved, that a demise of the premises in question for 21 years had been made by Maria Wilcox in 1831, to different persons for distinct parcels, and that, by several mesne assignments, the residue of the respective terms became vested in one Clark on the 4th of July, 1842.

Clark was called on the trial, and swore that he never had any benefi-

cial interest in these premises; that the deed was made to him by one Denham, at the instance of Louis Privat (not this defendant), who said he was going to the United States, and wished the title to be in Clark's name, who would act as his agent; that he did go way but soon returned and managed the estate himself, making improvements, acting as landlord and receiving rents; that about three years ago, Louis J. Privat, the defendant in this case, (who defends as landlord) came to Toronto, and witness, by desire of Louis Privat, made a deed to him of the property, having never executed before that, any conveyance of the property to Louis Privat, or to any one.

It was proved, that Louis Privat (judgment debtor) had paid the assessed taxes on these premises from 1841 to 1843.

The learned judge directed a verdict for defendant, seeing no proof of any legal interest in Louis Privat, which could have been transferred under the execution.

R. P. Crooks moved to set aside the verdict, for misdirection, and on the law and evidence.

He contended that Clark holding the term as trustee for the judgment debtor, the trust estate so held, though a leasehold, could be sold in execution under the 10th sec. of the Statute of Frauds. He cited 8 T. R. 467; 4 B. & Al. 684; 4 Bing. 96, 435; 1 C. & M. 450; 2 Atk. 107.

Adam Wilson shewed cause.

There is clearly no legal interest in the debtor which could pass under this execution. The legal estate is in the trustee, and the estate of the cestui que trust cannot be sold in execution. The Statute of Frauds does not apply to a trust estate of this kind. All that the sheriff could sell, under these facts, is a bill in equity; there is no certain estate upon which the writ can be said to attach. The sale is manifestly void.

ROBINSON, C. J., delivered the judgment of the court. .

We are clearly of the opinion that the verdict must stand, being properly rendered for the defendant. The debtor, Louis Privat, was not shewn to have any interest on which a ft. fa. against goods could attach.

The case of Scott v. Scholes et al. 8 E. R. 467, was much stronger, for there was there an equitable interest known and ascertained, something which the court could discuss and reason upon; but nothing certain is shewn here, and clearly not that kind of trust estate which the Statute of Frauds has made subject to an execution.

Per Cur.—Rule discharged.

MILLS V. JAMES.

Under the 10th & 11th Vic. ch. 15. sec. 5, the court will not direct the Clerk of the Crown and Pleas to give the certificate to the sheriff to admit a prisoner to the limits, without the Clerk is first satisfied that notice of bail for that purpose has been given to the plaintiff in the action, so that he might, if he had so chosen, have excepted to them in due time before justification.

John Duggan moved in this case for a supersedeas to sheriff of Home District to discharge James.

The Clerk of the Crown, on 17th February, 1848, certified that bail

was filed in his office at Toronto, with affidavit of due taking and of justification, giving the style of the cause, and the names and additions of the bail.

Recognizance filed 17th February, 1848. Defendant delivered to bail on a ca. sa. to the bail named in a plea of debt, entered into before a commissioner at Toronto; the condition being, that the defendant James "shall remain and abide within the limits of the gaol of the Home District, "and not depart therefrom, unless released by due course of law, and shall "obey all notices, orders and rules of court, concerning his remaining "upon the limits, or being remanded to close custody, as the court may "direct" pursuant to the statute.

The 10 & 11 Vic. ch. 15, sec. 5, allows of this kind of recognizance being entered into, for the purpose of obtaining the limits. But it requires "notice of the recognizance, and of the sureties therein, to be forthwith "given to the plaintiff, in the same manner as in the case of bail to the "action."

The statute then provides, that upon production to the sheriff of a certificate from the Clerk of the Crown, that such recognizance and affidavit of justification have been filed in his office, it shall be lawful for the sheriff to admit such person so arrested to the limits, and the sheriff shall be discharged from all responsibility respecting such person after such admission, and unless again committed to close custody, subject to an exception to be entered "to such bail as is now provided in case of "special bail, or by such rules as the Court of Queen's Bench may direct "and appoint."

It was not shewn that any notice of this recognizance was given in this case to the plaintiff's attorney.

ROBINSON, C. J., delivered the judgment of the court.

There is no affidavit whatever filed, nothing before us but these papers, and we are not told what has been done by the sheriff, and no foundation laid for any application to the court, and in fact no application is made. We have, therefore, no order to make. The parties concerned must act at their peril. The court can give no instruction or direction beforehand.

It seems that by the statute the defendant would be entitled to the limits as soon as he was entered into recognizance and justified; that the Clerk of the Crown and Pleas is to give the certificate when this is done—and that the sheriff is then to place the defendant on the limits, and will be released himself from all liability, whether the bail shall in the end prove to be sufficient or not.

And yet it seems to have been intended, that the plaintiff shall have an opportunity of excepting before justification, in order to which notice of bail should be given, but no provision is expressly made for giving notice of bail before justification.

It should be given between the entering into the recognizance, and the justification under it, and the statute should have provided for it, and directed what notice should be given.

But as it stands, I would not direct, that the clerk should give his certificate, until he saw that notice had been given, so as to admit of an exception in time.

As to the number of days before justification, if the practice referred

to in the statute, with regard to exceptions, affords a guide, it should be ollowed till a rule has been made. If it affords none, then a rule must be made. In the meantime the parties in this, as in other cases, must proceed under the statute as they may be advised.

Per Cur. - Rule discharged.

MEREDITH V. CULVER ET. AL.

A., the holder of a bill, sued B., the acceptor, and C., the indorser, as upon a bill "dated 1st June, 1847, payable three months after date," which, when produced at the trial, appeared to have been in fact "dated Nov., 1841., and payable four months after date," and to have been altered by crasure, and made to read as declared upon. Held, per Cur., that the alterations made in the bill were material to the contract, and therefore fatal to the holder's recovery, though an indorsee for value, and not shewn to have been in any manner privy to the alteration. Held, also, that the alteration in the body of the bill, as to the time of payment, was properly given in evidence, under the pleas of "did not accept," and "did not endorse."

Quære. Could the alteration in the date be given in evidence under these pleas. DRAPER J., dubitante on this point.

Assumpsit on a bill of exchange drawn by Culver and Cameron on Wagstaffe & Son, and accepted by them, and endorsed by Heron. All being sued in one action under our provincial statute.

Wagstaffe & Son sued as acceptors, pleaded that they did not accept.

Heron sued as indorser, pleaded that he did not indorse.

The case went down to be tried in the District Court of the District of Niagara, by writ of trial, under the statute 8 Vic., ch. 13, and evidence to shew that the bill, which was declared upon as a bill dated 1st June, 1847, payable four months after date, had been in fact dated the 1st of November, 1841, and payable three months after date; and that it had been altered by erasure, and made to read as now declared upon. The bill was drawn by Cameron and Culver in their own favour, and endorsed by them, and afterwards by Heron.

The evidence shewed, that the Messrs. Wagstaffe and Heron had, some years ago, occasionally endorsed accommodation paper for Cameron and Culver, whose circumstances had lately become less prosperous, and the defence was, that having on said occasion obtained from them formerly their acceptance and endorsement on a bill, dated in 1841, and payable at three months, which for some reason was not discounted or made use of at the time, Cameron had fraudulently changed the date to 1847, and made it payable in four months instead of three, and issued it at a period when he knew they would not have assented to grant him the accommodation.

The jury found the alterations fraudulently made by Cameron, and on that ground, under the judge's direction, gave a verdict for the acceptors and indorser. The plaintiff was not shewn or stated to be in any manner privy to the alteration; he was an indorsee for value.

H. Eccles moved for a new trial on the ground of misdirection, and reception of illegal evidence. He contended, that the bill being originally drawn, accepted and endorsed, for the accommodation of Culver and Cameron, they had a right to alter it as they pleased to suit their own purpose. That the plaintiff was the first holder who had a

right of action, i. e., the first person to whom it was issued for a valuable consideration, and as it was in the altered state when he received it, he had a right to recover on it as it stood; and none of those parties, who had lent their names for the accommodation of Culver and Cameron, could set up this defence at all, or at all events, not without a plea specially setting forth the facts. He also contended, that a distinction was to be taken between the cases, where an altered bill was rendered void at common law by reason of the alteration, and those in which the altered bill could not be received by the court in evidence, on account of the change requiring a new stamp, and that this fell within the latter class of cases, He referred to Chitty on Bills, 187.

Miller, of Niagara, shewed cause. He contended that the bill was altered in a material part of the contract and therefore void; and that the evidence of such alteration was properly receivable under the pleas of "did not accept," and "did not endorse."

His argument is fully stated in the judgments of the court. He cited upon these points, 13 M. & W. 778; 4 M. & G. 11; 4 M. & W. 417; 5
 Tyr. 1077; 2 C. M. & R. 291; 4 M. & G. 561.

ROBINSON, C. J.—I am of opinion that the evidence was properly received. The jury have found, that the Messrs. Wagstaffe accepted, and that Heron indorsed a bill, dated November, 1841, payable four months after date, but not a bill, such as is now sued upon, dated 1st of June, 1847, payable three months after date. They have, therefore, affirmed the pleas, that the first two did not accept, and the third did not indorse the bill sued upon.

There can be no distinction between one material alteration in a contract and another. If this bill had been drawn for 50*l*., and had been altered to 500*l*., and sued upon as a bill for 500*l*., the defendants could well plead that they accepted and indorsed no such bill. If, having accepted and indorsed a bill for 50*l*., they were sued upon one for 500*l*., and had denied the acceptance and indorsement; if the bill produced had been unaltered, standing as at first for 50*l*., of course the plaintiff must have been non-suited for the variance, and the effect is the same, if it can be only read 500*l*. in consequence of an alteration fraudulently made after they had accepted and indorsed it, because that cannot be read as part of the bill which they did not accept and indorse.

In some of the cases on this subject the date is treated as being no part of the bill, and consequently an alteration in that has not been looked upon as an alteration of the bill; but, though the distinction may not always seem to have been acknowledged or attended to, there is surely an evident difference when a bill, being dated on a certain day, is payable at so many months after sight, or so many months after date. In the latter case, an alteration of the date directly alters the contract, by accelerating or retarding the time of payment, and ought as clearly to vitiate the bill, as an alteration in the sum, and as clearly as if the date were part of the bill, for, by being referred to in the bill, as in the case before us, the date becomes in effect incorporated in the bill, and must be read with it to make it intelligible. It is as if this bill had run—Four months after the 1st day of November, 1841, pay to, &c.

Then the alteration of three months to four is unquestionably an alteration in the body of the bill, and a material alteration in the very

terms of the contract. If it had been altered to two months instead of four, it would have been like the case of Master v. Miller, 4 T. R. 320. But though the time of payment is not accelerated in this case by the alteration, but postponed, it will be equally fatal to the bill, for it is nevertheless an alteration in a material part. And it was judiciously remarked by the judge of the district court at the trial, that the holder of a bill, or the person putting it in circulation, may have a fraudulent object in thus postponing the time of payment, for it may by such an alteration, be made to appear as if endorsed before it was past due, which excludes some defences that would be open if the contrary were the case.

Then, taking either of these alterations to be such as to make the bill in its present form exhibit a material variance from that which was in fact accepted and indorsed (and I think that may be said of both alterations), the next question is, whether proof of the fact of alteration supported the pleas, or whether it was necessary, that the defendants should have pleaded specially that the will was altered.

Upon that point I am of opinion, that the evidence was rightly received, upon the pleas denying the acceptance and indorsement. The case of Cook v. Coxwell, 2 Cr. M. & R. 291, is in point, and many more might be cited. There can be no difference between this and the question, whether, upon non est factum to a bond, proof of a material alteration made since the execution will entitle the defendant to succeed upon the issue. Knight v. Clements, 8 Ad. & Ell. 215, and Calvert v. Baker, 4 M. & W. 417, are express anthorities in favour of this defence.

Heming v. Trennery, 9 Ad. & Ell. 926; Davidson v. Cooper, 11 M. & W. 778; Mason v. Bradley, 11 M. & W. 590; 7 Ad. & Ell. 446, may at first sight appear opposed to those decisions, but we must always bear in mind the difference between those cases, where the instrument is sued upon as it stood originally, i. e., not altered in any material part of its contents, and the defence is, that by tearing off a seal, cutting off a signature of a joint maker, interlining something in order to change its effect, or some other such act, the interest has been made void, so that it cannot be recovered on even when declared on as it originally stood, and without attempting to raise a new contract by the alteration. There the defence is not, that the defendant did not in fact make precisely such a contract as he is charged upon, but that, by reason of some dishonest practice, the holder has disabled himself from suing on that contract. The difference is obvious, and in the last class of cases it has been held, as we should expect it would be, that the defence must be specially pleaded.

The case of Parry v. Nicholson, 13 M. & W. 778, however, is a case in which the decision does not turn upon that distinction, in which the court certainly would seem to have overruled the cases of Knight v. Clements, and Calvert v. Baker, and to have determined, that if an alteration be made after acceptance, in the date of a bill made payable in three months after the date, the defendant cannot avail himself of the defence, on the plea that he did not accept the bill sued upon.

The judge who tried the cause had ruled otherwise, and received the evidence. The court, on the argument of a rule for a new trial, did not ake time to consider, but determined at once that the defendant required

to be specially pleaded. Parke, Baron, remarked, that the date was immaterial; but surely when a man accepts a bill, payable so many days after date, it cannot be immaterial whether it is dated now or three years hence. And what further perplexes me is, that the court hastily put an end to the argument, by saying that there had been "no such "decisions as Calvert v. Baker, and Knight v. Clemens, since the case "of Hemming v. Trennery, which they had since acted upon, viz., in "Mason v. Bradley, and Davidson v. Cooper."

But it is very clear, I think, that though the court seemed to suppose, that the three last cases had overruled Calvert v. Baker, and Knight v. Clemens, they are really not at all opposed to them.

In Heming v. Trennery, the instrument sued on had been altered by some words being interlined over part of the writing, the whole words being left otherwise as they stood before. The instrument was sued upon as it stood, not inserting the interlined words, and the defendant simply denied that he had made the contract as set out; whereas his defence really was, that though he had made exactly such a contract, the instrument had been made void by the fraudulent interlineation.

In Mnson v. Bradley, 11 M. & W. 590, the defendant was sued as maker of a note, which he and six others had signed; the signature of one was cut off, and he endeavoured to set that up as a defence, under a plea of denying that he made the note declared on, though in fact he did make just such a note, and his real defence was, that the note, which he had so made (for it was joint and several), had been made void, by fraudulently cutting off the name of one of the makers. The court held, that that defence should have been specially pleaded

In Davidson v. Cooper, 11 M. & W. 786, the plaintiff sued in assumpsit on a guarantee, and defendant pleaded non-assumpsit. In proof of the agreement, plaintiff produced a writing, and defendant proved, that when he signed it, it had no seal, and that a seal had been since set opposite to his name, which made the writing void.

The court held, quite consistently with all the other cases, that the evidence did not shew the defendant had not promised in manner and form, &c., and that, on the contrary, it shewed that he had; and the defence intended was, that having made the very contract declared upon, that contract had, by something done afterwards, been rendered void; and this required to be specially pleaded.

All these cases are in truth instances of defence by confession and avoidance, not by denial of the contract, and are, on that ground, plainly distinguishable from the present case, and also from Culvert v. Baker, Knight v. Clemens, and Cook v. Coxwell, and many other cases which the court seemed to suppose they were overruling.

Parry v. Nicholson does seem more difficult to account for, but it was hastily decided, and certainly on an erroneous view of the effect of the other cases.

If the court, on deliberate reconsideration, had expressly overruled the previous cases, which they did advert to, but without stating then the points in them, then we must suppose them to have determined, that if A. makes a note for 100l. and the payee fraudulently changes the 100l. to 1000l., and declares upon it as a note made by A. for 1000l., a plea, denying that A. made such a note, will not let him into his defence.

Until I see that decided upon a deliberate review of authorities and some reason given for this change in the law, I shall certainly think it right to adhere to the law as it stood before Perry v. Nicholson, which is at present the only case that I can find really at variance with former decisions; and that case, I apprehend, went partly on the idea, that the date was an immaterial part of a bill made payable at a certain time after date; and it might have been decided differently, if there had been such an alteration besides in the body of the bill, as there was in the case before us.

Of course I understand the question not to be, whether the defendant can, upon the plea of non fecit or non assumpsit, call upon the plaintiff to account for the alteration, and claim a verdict, merely because he has not accounted for it—but whether, upon such a plea, the defendant may not, after the plaintiff has proved the execution, give evidence, that the writing produced is not in the state in which it was when he put his name to it. And how could the jury in the case now before us say upon their oaths, that the Messrs. Wagstaffe accepted a bill, payable in four months from the 1st of June, 1847, if it was proved to their satisfaction, that the bill which they did accept was payable in three months after the 1st of November, 1841?

DRAPER, J.—The difficulty in sustaining this verdict in favour of the acceptors and indorsers, on their pleas denying acceptance and indorsement, is principally created by the case of Parry v. Nicholson, which, by its general language, gives to the doctrine of Heming v. Trenery a more extended sense and application, than the language of the court in that case would at first sight seem to warrant.

Heming v. Trenery decided, that where an instrument is declared upon precisely as the defendant executed it, and when produced does not vary from the statement in the declaration, excepting that other matter, not noticed in the declaration, is found added to it, the defendant, by a plea which only denies having executed the instrument declared on, cannot avail himself of the alteration as an avoidance of his contract. And Davidson v. Cooper, though a strong case, goes no further in principle, for there the instrument was declared upon precisely as the defendant executed it, and as it appeared when produced, though something not noticed in the declaration was added to it. And yet in Heming v. Trenery, the second count, which declared on the instrument in its altered state, was answered by a plea of non-assnmpsit, on which issue Lord Denman admitted evidence of the alteration being made subsequently to the execution of the instrument, and the jury found for the defendant on that issue. And I cannot donbt, that if the plaintiff in Davidson v. Cooper had declared in debt on a sealed instrument, the defendant might have availed himself of the addition of the seal after signature of the instrument, as a defence under a plea non est factum. But Parry v. Nicholson differs in this, that, as regards the date, the bill declared on that case, "the date is immaterial," but those words seem to refer to the Stamp Acts only. Still, in the manner of declaring, the precise date is not stated as matter of description; nor do the forms given by the new rules require the date of the bill to be so set forth-for declaring, that on a given day, A. B. made his bill of exchange in writing, does not amount

to an allegation that the bill bears date on the day named, and therefore a plea, denying the making or accepting such a bill, will not put the date of it in issue, and (laying aside any arguments based on the Stamp Acts, which have no application in this province) if the defendant relies on an alteration in the date, made subsequent to his making or accepting, he must, according to Heming v. Trenery, plead the matter specially, since adopting this view, as to the immateriality of the date named in the declaration, the bill is declared upon exactly as the defendant accepted it. - See 1 Chitty, pl. 340, (5th edition) and authorities there cited; 13 M. & W. 778; 4 M. & W. 417; 4 M. & G. 11, 561; 5 Tyr. 1077; 7 B. & C. 416; 3 B & Ad. 660. And I should consider this as the proper construction of Parry v. Nicholson, did not one of the judges treat Heming v. Trenery as overruling Knight v. Clements, 8 A. &. E. 215, in which case the alteration was in the number of months at which the bill was payable after date, and there, if it had been declared on in its original state, as a bill drawn at three months, there would have been a variance between the declaration and the bill as produced at the trial, or if declared upon in its altered state, it would have been a bill that which the defendant originally entered into, and therefore, as it seems to me, falling exactly within the principle maintained in Heming v. Trenery, where, on non-assumpsit, evidence was received of the alterations in answer to the second count, which declared on the instrument in its altered state.

Upon the best consideration I am capable of giving to these various and, in part at least, conflicting cases, I have arrived at the conclusion, that, as regards the alterations in the body of the bill, the evidence was receivable on the issues of "did not accept," and "did not endorse"; and that the verdict for the defendant on these issues is right.

This renders it unnecessary to decide, whether the alteration of the date was also admissible in evidence without a special plea. I am not at present prepared to hold, that such defence can be set up without a special plea; it would be in direct opposition to Parry v. Nicholson, and as the verdict can be otherwise sustained, I should desire to leave it open for future consideration.

Jones, J., and McLean, J., concurred.

Per Cur.—Rule discharged.

DOE DEM. BONTER V. SAVAGE.

Where at the time a deed of bargain and sale is made to A.—B is openly in actual possession of the land, using it as his own—nothing passes under the deed to A.

Ejectment for a small piece of land in the town of Belleville, being, part of the broken lots 40, on the south side of Mill Street, and west side of Church Street.

The title was proved to have been in one Sole, who, on the 11th of April, 1828, conveyed to Peckham and Millsten as joint tenants.

On the 12th of June, 1829, they made partition by deed.

On the 3rd of February, 1834, Millsten sold his share to one Gorden, and, on the 10th of February, 1846, Gorden conveyed to plaintiff the

some land as had been assigned to Millsten by the deed of partition, which is described in that deed as follows:

"Commencing on the west side of Church Street, at the north-east angle of the said lot 40 on Church Street; then south sixty-three degrees, west two chains sixty-eight links; then south forty-five degrees, west one chain fourteen links more or less, to a stake and stone near Josiah Peckham's furnace; then south sixteen degrees, east ninety-six links more or less, to the southern boundary of said lots; then north seventy-four degrees, east three chains twenty-nine links more or less, to the western limit of Church Street; then north sixteen degrees, west one chain fifty links more or less to the place of beginning.

The deed, given by Millsten to Peckham (under which defendant holds) on the partition, described the land which Peckham was to hold as follows: "commencing on the south limit of Mill Street, at the stake" and stone near the furnace of the said Josiah Peckham, marking the "west boundary of that part of said lots partitioned to the aforesaid "Charles Millsten; then south forty-five degrees ninety-two links more" or less, to the allowance for a street intersecting Mill Street; then "north seventy-four degrees, east one chain forty-six links more or less, to the intersection of the west boundary of the aforesaid Charles "Millsten's part of said lots with the southern boundary thereof; then "north seventy-six degrees, west along said western boundary of the "Charles Millsten's part of said lots, ninety-six links more or less to the place of beginning."

It was entirely a question of boundary. The jury found for the defendant.

Wallbridge, of Belleville, obtained a rule for a new trial, the verdict being contrary to the law and evidence, and the judge's charge.

J. H. Hagarty shewed cause.

The case turned wholly upon the evidence.

ROBINSON, C. J., delivered the judgment of the court.

Independently of the question, whether the limits set down in the deed, under which the plaintiff claims, could include the land in question, which it was clearly not intended to do, and independently also of the question, whether, after eighteen years possession in the defendant, and those under whom he claims, a conveyance should not be presumed by a jury, especially considering the further proof of acquiescence in the boundary by the other party—there is the conclusive fact in the defendant's favour, that when Gorden made to the plaintiff the deed of bargain and sale, under which he now claims, the defendant was openly in actual possession of this land, using and clearing it as his own, and therefore such land could not pass by the conveyance.

A comparison of the distances on the plan with the description shews, I think, to a certainty, that it was not intended that the deed to Millsten should have embraced the land which the plaintiff now claims under that deed, and that the law and justice of the case are both in favour of the verdict which has been rendered.

Per Cur.-Rule discharged.

DOE DEM. MURRAY V. SMITH.

Where land is described generally in a deed, as being part of $Lot\ No.\ 4$, and the particular and specific description that is afterwards given, clearly shews it to embrace a part of $Lot\ No.\ 3$, as well as $Lot\ No.\ 4$ —the specific, and not the general description must be taken to govern.

In this case the crown, by letters patent, had granted the defendant certain premises particularly described in the patent, and called part of Lot No. 4, when in fact the land described embraced a part of Lot No. 3.

The number of acres mentioned in the patent was less by fifty acres than the number actually covered by the description; and the question for the court to decide was, whether the specific description of the land, or its general name as Lot No. 4, ought to govern.

R. P. Crooks for the lessor of the plaintiff.

J. Lukin Robinson for the defendant, cited Hob. 174; 4 Taunt. 734; 4 Cruise, 271; Doe Owen v. Curtis, in our own court.

ROBINSON, C. J., delivered the judgment of the court.

The crown has in this case granted two patents, which embrace in part the same land, as it appears.

That which the defendant claims under was made some years before the one under which the plaintiff claims, and must, on that account, prevail, if it does without question cover the land in dispute.

The description in the defendant's patent is so circumstantial and precise that it leaves nothing to be argued; for beginning at a point, which is ascertained and not disputed, on the limits between lots No. 4 & 5 in the 2nd concession of Etobicoke, south of Dundas Street, it runs from thence easterly, or rather in a north-easterly direction, to the river Etobicoke, then follows the winding of the river to another point, precisely marked, and about which there can be no dispute; thence it returns to the boundary between lots No. 4 & 5, and then follows along that boundary to the place of beginning. All this tract is called in the patent by the name of part of lot No. 4, when in truth there is a lot No. 3 intervening between lot No. 4 and the river Etobicoke; and a good part of the land comprehended within the limits mentioned in this patent, is composed of a part of this lot No. 3.

If all that forms no part of lot No. 4 were rejected from the defendant's grant, and could be held to form no part of it, then the tract so limited would be about eighty acres in extent, which is what the patent expresses regard to quantity of land, but, on the other hand, the patentee would be cut short from the river, and, instead of the land*being bounded on one side wholly by water, it would be at such a distance from it as to leave more than fifty acres excluded from his grant.

It is difficult to understand how such an error came to be committed, because the quantity expressed being eighty acres, that would seem to shew that the description was framed with a correct knowledge of the extent of ground which lot No. 4 covered, and with the plan of survey in view, and yet the same plan must have shewn that Lot No. 4 did not extend to the river along its eastern side, but that, between the lot and the river, there were more than fifty acres of land laid down as composing lot No. 3.

Similar mistakes have been committed, in the multiplicity of business transacted in the land offices, and we have had occasion in other actions to determine what shall be the effect of a patent under such circumstances.

Doe dem. Owen v. Curtis (Mich. Term, 1840) was a case of this kind, and we held there, as we have held in other cases, that if the crown makes a grant with a description, which, according to visible boundaries, natural or otherwise, does clearly embrace certain lands, then those lands must pass, and the patentee must be allowed to hold up to the specific fixed boundary mentioned, provided the crown had a right to grant the land thus described.

The two inconsistencies in this case are: 1st. The quantity of land; but that is of frequent occurrence, and we should introduce great confusion, if, where a boundary so marked as a river has been referred to, we were to shut the party out from it by any close adherence to the quantity of land. The 2nd is, in calling by the name of lot No. 4, what in fact composes lots No. 3 & 4.

That presents the question, whether the mere name of the tract, of the certain and specific description of it, is to prevail; and there the law is clear, that where either the thing or the person meant in a deed is evident, the name that happens to be given is not the material point, and does not govern. Of this there are numerous instances given in the books. But does or does not our Survey Act, 59 Geo. III., ch. 14, interfere with this principle, as applied to lots of land designated by the numbers applied to them in the original survey? We think not, for the only object and effect of that act is to settle the boundaries between lots and concessions, not between one man's rights and another's.

A valid grant of land might be made, without naming either lot or concession, provided the tract intended to be granted were made certain. If it should ever hereafter become a question where lot No. 4 in this concession ends, and where No. 3 begins, then the statute will apply in assisting to decide that point; and even while the defendant continues to hold the tract which has been granted to her up to the river, the lot No. 4 will still be only what it was defined to be in the original survey, notwithstanding the error in this patent, in assuming that all the land up to the river formed a part of No. 4.

Mr. Cruise, in his work on Real Property (Vol. 4, p. 42), lays down the principle, "that a deed will be good, though the several things com"prehended in it be not described by their proper appellations, or not
"drawn in a regular manner, for if the description be sufficient to shew
"what was meant and intended to be conveyed, it will not become void
"on account of any immaterial inaccuracy or mistake."—Hob. Rep. 174;
Bridgman's Reports, Grants of King.

It may indeed be urged, that what was intended in the case before us to be granted was lot No. 4, and that only; and that the only mistake was, in imagining that it extended to the river, and that the quantity of land expressed shews that; but, on the other hand, it cannot for a moment be maintained, that the king did not intend the grantee to hold the land up to the river, when the river itself is made expressly to constitute its boundary along one whole side of it, and the very course of the river is mentioned.

WILSON V. GRAYBIEL ET, AL.

Held, per Cur., that the following conviction for selling spirituous liquors by retail contrary to law—"that A. B. of. &c., merchant and shopkeeper, did within the "space of six calender months now last past, in the year aforesaid, at. &c., sell and "vend a certain quantity of spirituous liquors in less quantity than one quart, to "wit, one pint, &c., without license for that purpose previously obtained, contrary "to the form of the statute in such case made and provided"—was bad in substance—in leaving it doubtful, under which of the statutes (40 Geo. III., sec 3; 6 Will. IV. sec. 2; 6 Geo. IV. ch. 4)—and for what offence—the conviction was made.

Semble, that after a first conviction had been returned to the quarter sessions and filed, the justices, if they think it defective, may make out and file a second.

Special case. Trespass for taking goods.

Plea, general issue by statute.

Defendants were justices, and had convicted plaintiff of selling spirituous liquors by retail contrary to law,

They made this conviction on the 13th June, 1846; it was filed on the 16th July, 1846, with the Clerk of the Peace, but, being in several respects defective, a new one was made out and filed the 20th Sept., 1847 (during the assizes.)

It was objected, that this second conviction could not be received, the first having been returned and filed in the quarter sessions, and moreover, that the second was also insufficient on several grounds which were taken, viz., 1st, That it was not shewn by the conviction, that John Wilson, the plaintiff, was a licensed shopkeeper or merchant.

2ndly. That the offence was not shewn or charged with sufficient certainty, or any certainty at all; it not being alleged to have been done on such a day, or at such a time, pursuant to the statute.

2rdly. It was not shewn by said conviction, what kind of spirituous liquors were sold, or to whom sold, or in what quantity; and that two offences were charged.

4thly. That no offence was clearly stated, it being uncertain, whether plaintiff was fined for selling less than his license allowed him, or for selling without license; for if he sold less than one quart, it ought to be shown that he was a licensed merchant; and if he was not licensed, then conviction should be for selling without license.

5thly. That it was not alleged in second conviction, that John Wilson was convicted, &c., &c.

6thly. That convictions did not support the distress warrants: of parts of which the following were extracts, "For that he, the said John Wilson, "in the ninth year of the reign of our sovereign lady Victoria, and within "the space of six months, did sell spirituous liquors in a less quantity than "one quart, contrary to the form of the statute in such case made and "provided, whereby he hath forfeited the sum of 21l. 19s. 3d. of lawful "money of Canada." And

7thly. That distress warrant was bad, it being founded upon and reciting a defective conviction, &c., and bad of itself.

Verdict for the plaintiff, subject to points reserved.

Lawder, of Niagara, for the plaintiff. He contended that the conviction could not be received, and cited, in support of his objections mentioned above, the following statutes and authorities; Cowp. 35;

2 T. R. 96; 8 T. R. 536; M. & R. 160; 5 D. & R. 489; 2 B. & C. 720; 4 D. & R. 260; 2 D. & R. 411; 6 N. & M. 845; 5 A. & E. 365; 4 T. R. 768; 2 M. & W. 325; 2 Stra. 899; 1 T. R. 249; 4 D. & R. 83; 2 D. & R. 170; Paley, 87; 10 A. & E. 11; 12 A. & E. 629; 5 A. & E. 359; 8 A. & E. 124; 1 D. & L. 721; 9 C. & P. 75; 1 Q. B. 712; 43 Geo. III., ch. 4, sec. 1; 2 Will. IV., ch. 4. He also contended that even if the second conviction was good, it could not be received in evidence, as the justices were bound by the first.—3 B. & C. 649; 1 E. R. 185.

J. Boulton, of Niagara, for the defendants. He relied particularly upon the 2 Will. IV., ch. 4, as giving no protection to the justices even when the conviction was bad, so long as it had not been quashed. He cited R. & M. 135, and 1 A. & E. N. S. 712; the latter case, as supporting the admissibility in evidence of the second conviction.

ROBINSON, C. J., delivered the judgment of the court.

Whether a second conviction could be received after the first had been returned to the quarter sessions and filed, it is not necessary, I think, to determine, but the case of Chaney v. Payne, 1 Ad. & Ell. N. S. 712, seems to support its admissibility.

The misfortune here is, that the second conviction is no more a sufficient justification than the first, and that the commitment is incurably bad upon the face of it. The case of Rogers v. Jones. Ry. & Moo. 135, is very applicable to the present, and I refer also to Selwood v. Mount, 1 Ad. & Ell. N. S. 749.

It is difficult to satisfy oneself, amid the multiplicity of statutes in force on this subject, under which of them the justices may have supposed they were proceeding when they made the conviction; but the 49 Geo. III., sec. 3, seems the provision most clearly applicable to the case, as set forth in the information and complaint, for it is there stated, that Wilson, being a shopkeeper, did sell spirituous liquors in a less quantity than one quart, which seems to be intended as the offence prohibited by that clause.

To make it a good charge under that clause, however, it ought to have been stated, that he was a person licensed to sell liquors by retail, otherwise the case might be one under the second clause of 6 Will. IV., though to bring the case under that clause it should be stated, that the defendant had no license. It is not stated in the complaint in this case, that he had no license, in which case the 6 Geo. IV. would apply, or that he had a license, but exceeded it by selling a smaller quantity than a quart, which would bring it under the 40 Geo. III.

The conviction, untruly reciting the information, supplies the words which the information did not contain, "without leave for that purpose previously obtained;" and the justices adjudge him guilty of selling spirituous liquors in a less "quantity than one quart, viz., one pint, without license for that purpose previously obtained," which brings that case under 6 Geo. IV., ch. 4, though I do not imagine that they meant otherwise than to convict him of selling by a less measure than his license as a shopkeeper allowed, which is properly a case under 40 Geo. III. And as the conviction is framed, it leaves it uncertain under which statute and for what offence it was made, for if Wilson was convicted

because he sold without any license, then it was insensible to make it part of the charge, that he sold less than a quart.

But the warrant, made out as it was under the first conviction, and before the attention of the justices had been called to its faults, is even more defective, for that describes the offence to be, the selling by John Wilson (not calling him a shopkeeper) "spirituous liquors in a less quantity than one quart," not stating whether he had a license or not. For all that is stated in the warrant, Wilson may have been an innkeeper duly licensed, and therefore entitled to sell any quantity however small. The commitment states no offence, and it is not supported by a conviction in accordance with it.

And moreover, it states that Wilson had forfeited for his offence 21l. 19s. 8d., which exceeds the penalty imposed by law. They might as well have made their warrant for 100l. I dare say the excess above 20l. was the amount of costs, but it is not so expressed, but distinctly otherwise.

It is out of our power to protect the justices against the consequences of this injustice, and the verdict therefore must stand.

It was argued, that the warrant containing the words "contrary to the statute," all may be intended that is necessary for making the act an offence against the statute; but, in the first place, we can only conjecture here what statute the defendant is charged with having violated, and if that were plain, yet the conviction and warrant should tirst shew something done which is contrary to the statute, and then their conclusion would follow properly from the premises, otherwise a criminal charge would contain no certainty at all.—2 Lev. 85.

The defendants endeavoured to protect themselves by the statute 2 Will. IV., ch. 4, but that statute is similar in its provisions to the English act, 43 Geo. 3, ch. 141, and only applies where the conviction has been quashed for want of some form in the proceedings, not where the conviction is bad in substance on the face of it. That has been repeatedly decided in England, and indeed the language of our statute does not admit of any other construction; and the warrant here is bad as well as the conviction.

Per Cur.—Rule discharged.

MADDOCK V. GLASS.

Where a disputed item, forming one distinct head of the plaintiff's demand, has been improperly disallowed by the jury, the court will grant a new trial, though the plaintiff has a verdict for something, the principle upon which the courts refuse a new trial to the plaintiff for smalness of damages, not being held to apply.

The plaintiff sued in assumpsit, for services rendered as an attorney and solicitor.

The defendant pleaded payment of 37l. 2s. 6d., and non-assumpsit to the residue.

The plaintiff, as solicitor, had conducted proceedings in a suit in Chancery on the part of this defendant and others, who were defendants in that suit. The Court of Chancery having decided against them, it was determined to appeal, and the plaintiff in this cause wrote to the defendant, informing him of it, on the 7th of February, 1846, stating that his name had been included in the petition of appeal, and requesting him to say whether he assented. The defendant wrote, that he declined being a party to their appeal, and his name was consequently struck out.

On a bill being furnished by plaintiff of the other costs, and a bill drawn on defendant for the amount, the defendant returned the bill accepted, and wrote to the plaintiff as follows: "I will have funds in the month of "October to meet it, or more if you should want it. You may let my name remain in the appeal if you see meet."

The appeal went on in the name of all the defendants, Glass's name being restored, and was successful. There were nine defendants, and, apportioning the costs among each, the plaintiff claimed of this defendant 56l. 12s. 1d., which the defendant refused to pay, or any part of it, alleging, by a letter written in June, 1847, that he had never sanctioned the use of his name in the appeal.

On the defendant's part, a witness was called at the trial, brother to one of the other defendants, who swore, that in April or May, 1846, he had a conversation with the plaintiff, in which he stated, that he had only succeeded in getting the defendant to allow his name to stand in the appeal by indemnifying him against any claim for costs.

Verdict for plaintiff, 12l. damages.

P. M. Vankoughnet obtained a rule for a new trial without costs, the verdict being contrary to law and evidence, in regard to the smallness of the sum allowed to the plaintiff, and on affidavits setting forth special grounds of surprise, from the testimony given by one of the witnesses for the defendant.

A. Wilson shewed cause, he cited 2 A. & E. N. S. 937.

Robinson, C. J., delivered the judgment of the court.

The evidence of the witness is wholly inconsistent with defendant's letter of the 30th of April, 1846, and 9th of June, 1847, and the plaintiff files an affidavit, in which he swears, that nothing of the kind ever passed; that he had no intimation that such a defence would be attempted, or that he could have proved, that the occasion of his having a conversation with the witness at Ogdensburg was in April, while defendant's name was excluded from the appeal, and before defendant wrote to him the letter of the 30th of April, 1846.

The jury, placing credit as it seems in the evidence of the witness, rejected the bill of costs for the appeal, and allowed only a small unpaid balance of the costs of the Court of Chancery.

As the disputed item forms one distinct head of the plaintiff's demand, if it has been improperly disallowed, though wholly from a mistake or otherwise of the jury, still the principle would not apply, which in general prevents the court from granting a new trial for the plaintiff for smallness of damages, while he has a verdict for something.

There is such a contradiction in this case, between the evidence given by James Simpson, and the defendant's own letters, that it is fit the matter should be submitted to another jury: but we can only grant a new trial on payment of costs.

Per Cur.—Rule absolute for new trial on payment of costs.

FRASER V. DICKSON.

The coroner, under a special writ of venire, is not required to return a panel of thirty-six jurors—the 36 Geo. III., ch. 2, and the General Jury Law, being applicable only to the sheriff, and not to the coroner.

The sheriff sued in trespass for false imprisonment, in having arrested the defendant under a warrant issued by the justices of the peace sitting in quarter sessions, may give this justification in evidence under the plea of the general issue.

The 21 Jac. I., ch. 12, extends its privileges to sheriff, when acting under the commands of the justices.

Semble, that a warrant having no seal, does not make it invalid.

The plaintiff declared, that the defendant, on the 6th of January, 1847, saulted plaintiff, and seized and laid hold of him, and forced him to go, and caused him to be forcibly conveyed in custody, along the highway, to a certain court room, and there imprisoned him for the space of two hours, at the expiration whereof the defendant forced the plaintiff to go, and caused him to be conveyed in custody from the said court room to certain common gaol, and there again imprisoned plaintiff for two hours hen next following, contrary to law, &c.

Plea, not guilty, "by statute."

The defendant is sheriff of the District of Bathurst, where the venue was laid. At the trial the defendant's counsel objected, that the coroner, to whom the venire was directed, had not returned a full panel of thirty-six jurors, but only sixteen, which objection the learned judge overruled.

The facts of the case were these At the general quarter sessions in November, 1846, an indictment was found against this plaintiff for a libel, and he entered into recognizance in court, to appear and take his trial at the next court of quarter sessions, to sit in January following.

He appeared then and was desirous of being tried, but the justices determined to transfer the case to the assises. On the second day of the court, a bench-warrant was made out in the usual form, directed to the sheriff, and to all constables and other her Majesty's officers and ministers within the District of Bathurft, &c., required them to arrest the defendant (plaintiff in this action), and to bring him before the court, or before some justice of peace for the district, to find securities for his appearance at the next session of the peace, and to be further dealt with according to justice.

This warrant was signed by the Clerk of fhe Peace, but had no seal. It was tested in open sessions at the court house, 6th January, 1847. It was delivered by the Clerk of the peace in court to the sheriff, who handed it to his deputy. The plaintiff had just before left the court, and the deputy-sheriff followed him and found him in the street. He turned round and asked the deputy-sheriff if he wanted him, and if he had anything for him. The deputy-sheriff told him he had, and shewed him the warrant; the plaintiff then accompanied the deputy-sheriff to the court, after reading the warrant.

The deputy-sheriff swore that he was instructed to get plaintiff into court in as mild a manner as possible, and not to arrest him unless it should be necessary; that he did not consider that he had arrested him, but that when he got him into court he considered him in custody, and

that some days afterwards he returned on the writ that he had arrested him, and charged for the arrest.

The deputy-sheriff further swore, that the plaintiff asked him in court whether he considered him in custody, and was told, that he did so consider him; that while they were going from the street to the court house, the deputy-sheriff went into the sheriff's office, and the plaintiff walked up into the court room.

When he got there, he was told that he was not to be tried then, but must give bail to appear and take his trial at the next assizes. This he refused to do, alleging that he was then under recognizance to appear at the quarter sessions, and was ready for trial there.

Upon his refusing to give bail, the court directed an entry to be made, that Mr. Fraser, having acknowledged himself in the custody of the sheriff, and in court, and having refused to enter into recognizance to appear at the next court of Oyer and Terminer to take his trial for libel, it is ordered by the court, that he remain in custody of the sheriff, until he enters into recognizance, himself in 201., and two sureties in 101. each.

The sheriff (defendant in this action) offered to the plaintiff to go with him to any magistrate for the purpose of giving bail, but the plaintiff not desiring this, as it seems, the defendant, at the breaking up of the court, which was about two hours after the plaintiff had come into court, took him to gaol, and he was detained there an hour and a half, when a magistrate was procured by defendant sending for him, and bail was given.

The defendants's counsel moved for a nonsuit: 1st Because he denied that any arrest was proved under the warrant. 2ndly. That if plaintiff was arrested, it was by warrant from a Court of Record, which made it the duty of the sheriff to arrest under it. 3rdly. That the subsequent imprisonment of plaintiff in the gaol was by order of the Court of General Quarter Sessions, made for a legal cause, uamely, his refusal to find bail to appear at the assizes, which order the sheriff was bound to obey.

It was contended, on the other hand, that the defendant, as sheriff, could not give his alleged justification in evidence under the general issue.

The learned judge overruled the defendant's objections, reserving leave to him to move to enter a nonsuit.

The plaintiff had, before bringing this action, served the defendant with a demand of perusal and copy of the warrant, under which he had, on the 6th of January, carried and conveyed him in custody before the justices assembled in the court house in Perth, and from the court house to the common gaol, &c.

This notice was of course intended to be given according to the British statute 24 Geo. II., ch. 44.

Verdict for plaintiff, and 251. damages.

Adam Wilson obtained a rule for a new trial on the law and evidence, and on the ground of irregularity in summoning the coroner's jury, and for nonsuit on the leave reserved. He cited, in support of the objections urged at the trial, 6 Mod. 173; 6 B. & C. 528; R. & M. 26; 2 N.R. 211. As to the irregularity in the jury panel, he cited 4 M. & S. 467; Bac. Ab. Jury, E. F.; 5. B. & C. 469; Willes, 484; 6 Taunt. 460; 9 M. & W. 469; 3 Q. B. 919.

G. A. Phillpotts shewed cause. He referred to 9 Jurist, 842; 1 M. & W. 408; 12 Law Journal, 22, Q. B.; 5 Tyr. 106; C. M. & R. 638; 1 G. & D. 208, 275; 2 Salk. 637. He also referred to 12 A. & E. 599, to shew that the warrant must be signed.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the objection to the jury, I do not think there is anything in it. The sheriff summons a general panel, of not less than thirty-six, nor more than forty-eight jurors for each assize, because he is directed to do so by a particular statute. The object of that was not merely (if at all) to give the suitors a better chance of impartial jurors, but to ensure a sufficient number for the trial of all issues, without the necessity of returning a seperate panel for each cause.

In civil cases, the law does not contemplate any challenge without cause, and challenges for cause are always open to the party.

Coroners, when they summon juries, do not do so under the statute 36 Geo. III., ch. 2, or under the General Jury Law, but they obey a special writ of venire awarded in the particular case, which is to summon twelve men; and we cannot call it an irregularity, that when they had been commanded to summon twelve, they have not summoned thirty-six or forty-eight. The sheriff summons forty-eight Jurors, not with a view to the trial of each cause, but for the purpose of trying all the causes; not to compose a jury in each case, but that out of them, as the act says, a jury of twelve men may be taken to try each cause, without any writ of venire facias for that purpose. Here the coroner acts, not under the statute, which does not apply to him, but under the writ only, and he obeys its commands. What was done in this case has, so far as I know, been the practice in all cases.

Upon the other points in the case—the first is, whether the sheriff could give his justification for the imprisonment in evidence without specially pleading it. I think it is clear that he may. He has pleaded the general issue "by statute."

If a constable had executed the warrant which was given to the sheriff in this case, or had obeyed the order of the quarter sessions, by taking the plaintiff in custody in open court by their order, there could have been no question but that he could have given his defence under the general issue. That the justices could have done so I take to be certain, and the constable also, under the express words of 21 Jac. I., ch. 1, sec. 12. Seargeant Hawkins, in his chapter on the Court of Quarter Sessions, lays it down, that when a statute enables two justices to do an act, the justices sitting in quarter sessions may do the same act.

They are not the less justices of the peace, because they are sitting in court in that capacity. It would be singular, if the justices who gave the order or warrant, and any constable executing it, could claim the privilege of the statute, and that the sheriff, acting in the place and doing the duty of the constable, should have no such privilege.

It is true, he is not named in the statute 21 Jac. I., and I do not find any case in which the question has been raised, whether, when he executes a warrant which a constable might equally have executed, he has or has not the same privileges as to his defence.

Indeed I apprehend the sheriff is seldom or never involved in actions of trespass in England, upon such grounds as the action before us has

been brought; and that arises probably, in the first place, from the fact, that warrants of this nature are always put into the hands of constables or inferior officers to be executed; and, in the next place, that it would be considered unreasonable, as I think it is, to harass a sheriff with an action when he has simply done his duty in obeying the mandate of a court of record, and, besides, it would seem to be harassing him to no purpose, for I take it, the law in all cases like the present holds him harmless.

The 42 Geo. III., ch. 85, was referred to, and it is very proper to be considered. I am surprised to find how seldom it seems to have been attended to in the discussion of questions, whether certain officers may give special matter in evidence under the general issue. It contains a most comprehensive provision extending to all officers, civil and military, in all parts of the British dominions. But I am not sure that I quite understand the whole effect of it. It seems to have been meant only to extend to cases of officers imprisoning persons by their own authority, not in obedience to authority derived from others, and yet it extends to all officers, the provisions in the old statute 21 Jac. I., ch. 12 and these, certainly grant the privilege to persons acting under warrants from justices.

But I think the case is clear under the statute 21 Jac., for that extends the privilege to justices of the peace, and all who act in their aid or by their commandment, which certainly the sheriff did in this case when he executed their warrant.

Then being allowed to give his defence under the general issue, pleaded as it is "by statute," the question is, was he justified by what was shewn.

I am of opinion that he was very clearly justified, for he was bound to obey the warrant delivered to him by the justices (or, which is the same thing, by their clerk) in open court, and equally bound to obey their subsequent order to detain the plaintiff till he should find bail.

And I see nothing that should have led to the idea, that the sheriff was liable to an action, or that the plaintiff was in any manner injured by the command which he was bound to obey. The justices had a right to refer the case for libel against one of their own body to the assizes, and the defendant should have felt that it was an act of delicacy on their part, and just towards him, when they proposed doing so.

The case was one over which the justices had clearly jurisdiction. They exacted bail because it was legal and right, the defendant refused to find it, and could not but be committed in consequence. In all that was done, the evidence shewed that the defendant acted with no unnecessary rigour, but was instrumental in aiding the plaintiff to procure bail, discharging him the moment it was done. As to the warrant having no seal, I apprehend that does not make it invalid.

Per Cur.—Rule for nonsuit made absolute.

GRAHAM V. BROWNE AND BROWNE.

Where A., the general agent for shipping B.'s flour, shipped twenty-five barrels of it, as usual, to A. & Co. in Kingston, and, before the sailing of the ship, D., another agent, under special instructions from B., shipped the same flour to Messrs. B. & Co. in Kingston, to be forwarded to Montreal; Hald, Fer Cur., that as the owner of the flour could at any time change its destination before

the ship sailed—the owners of the ship were liable to B. through their master's last bill of lading given to the special agent D.—the flour having been forwarded by the master's mistake to Messrs A. & Co. in Kingston and left there, instead of being forwarded as last directed through B. & Co. to Montreal.

The plaintiff sued in assumpsit, setting forth, that defendants, on 4th November, 1845, being owners of a certain schooner then lying at Port Hope, undertook to carry twenty-five barrels of flour of plaintiff's on their said schooner, from thence to Kingston, to be then delivered for plaintiff to Messrs. Sanderson, Murray & Co., to be by them forwarded for the plaintiff to Montreal; and he charged as a breach, that although the defendants did receive the flour on board of the schooner, and did convey the same to Kingston, yet they did not deliver the same to Messrs. Sanderson & Murray there, but neglected and refused to do so whereby plaintiff lost the sale of the goods in Montreal during that season, 1845.

Defendants pleaded non-assumpserunt.

2. That the goods were not the plaintiff's.

It appeared on the trial, that the plaintiff, having mills in Cavan, was in the habit of sending down flour to Port Hope during the year 1845, to be forwarded from thence, and that several shipments of this flour had been made by one Henderson, a wharfinger, at Port Hope, consigned to McPherson & Co. at Kingston, subject to the plaintiff's order. Henderson was examined, and said that he sent the flour to McPherson & Co. generally, knowing that the plaintiff forwarded through them; that these twenty-five barrels came to him without any special instructions, and that he received them at the wharf from plaintiff's teams and gave a receipt for them, taking also a receipt from the captain of the schooner Amity, then at the wharf, in order to shew the plaintiff that they had been shipped.

He made an entry in his book of the flour as shipped to McPherson & Co. Kingston, and gave, as he said, a bill of lading to correspond.

In this wharfinger's book the entry is of twenty-five barrels of flour shipped for J. Graham to McPherson, making no mention of any consignee in Montreal.

But it was proved, that on the same day, 4th November, one Rhodes, living at Port Hope, being employed in shipping flour for Gilmour & Co., was specially instructed by the plaintiff to ship these twenty-five barrels of flour to Sanderson & Murray at Kingston, consigned to Messrs. Patton & Co. at Montreal, and in fact the flour had been sent in to him with those directions, of which he stated that he apprised the wharfinger before the flour was shipped. A large quantity of Gilmour & Co.'s flour was shipped at the same time on board of the schooner, consigned to Sanderson & Murray at Kingston; and one Waddall, who was the person employed in shipping Gilmour & Co's. flour, made a shipment of these twenty-five barrels also at Rhodes's request, and on the 4th of Nov., took from the master of the schooner a regular bill of lading, in which was first set down Gilmour & Co.'s flour, consigned to Gilmour & Co., Montreal, and then the entry, "J. Graham, Cavan, twenty-five barrels of flour, consigned to James Patton & Co., merchants," both which parcels the master, by the bill of lading, promised to deliver in good condition to

Messrs. Sanderson & Murray at Kingston; and this bill of lading, signed by the master, was forwarded by Waddell to Sanderson & Co.

The master delivered Gilmour & Co.'s flour at Kingston to Sanderson & Murray, but took the plaintiff's flour to McPherson & Co., being governed, as it appears, unfortunately, by the entry in his shipping book, and forgetting the bill of "lading which he had given to Waddell, which mentioned Patton & Co. of Montreal as the persons to whom it was to be forwarded. McPherson & Co. receiving no instructions about sending it to any particular consignee in Montreal, it remained in their warehouse there till the following year. Whether it was damaged or not, and whether plaintiff sustained any real loss or not from fall in price, was not shewn.

It was sworn by the master of the vessel, that after he had given to the wharfinger what he called the bill of lading, but what seems to have been nothing more than signing the entry in the wharfinger's book, he expressed his unwillingness to Waddell to give the bill of lading in which the defendants were charged in this action, saying that he had given one already, but that being told that they wanted it only as a matter of form, to show the plaintiff that they had shipped his flour, he consented.

Verdict for the defendant.

Adam Wilson obtained a rule for a new trial, the verdict being contrary to law and evidence, and for misdirection, and upon affidavits filed.

R. O. Duggan, of Hamilton, shewed cause. No cases cited.

The argument of counsel fully appears in the judgment of the court. Robinson, C. J., delivered the argument of the court.

On looking at the other evidence in the cause, and at the affidavits filed since the trial, there seems much reason to believe that the master was mistaken in what he said, and that he had first signed the bill of lading at Waddell's and that it was when the wharfinger, Henderson, asked him to give him a shipping receipt that he made an objection, and said he had already given one bill of lading, but when told that Henderson wanted it only in order to shew Graham that he had shipped the flour he consented.

But if it had been otherwise, as it was assumed to be at the trial, I still think that the case went to the jury under a mistaken impression as to the legal consequence of what had taken place; for, admitting that Henderson, meaning to comply with Graham's supposed intentions respecting the disposal of his flour had in the first instance put it on board, with the understanding between him and the master, that it was to be taken to Kingston and then delivered to McPherson, without any particular direction, yet surely it was competent to the owner of the flour, by instructions sent to a particular agent at Port Hope, to change the destination, and to consign the flour to the same forwarders at Kingston, to whom the chief part of the cargo was to be consigned, with directions to them to forward it to certain consignees at Montreal.

This was done in a formal, binding manner, and if the flour had before been shipped by the wharfinger, under a sort of general understood agency (for nothing more was pretended), it was in the power of the owner thus to change the arrangement that was made without special instructions, and to countermand the instruction which had been given in ignorance of his wishes. McPherson & Co. were mere forwarders. It was not shewn or pretended they or any third party had an interest in the flour, or any right to control it, and the defendants were therefore bound by the engagement which their master had made.

Up to the moment of the vessel sailing, the plaintiff had a full right to do what he liked with his flour; he could have directed it to be unladen if he pleased, and could send it to whom he liked. The only ground of doubt, as to granting a new trial, arises from the want of any satisfactory proof on the last trial, that the plaintiff had really received a substantial injury from the failure of the master of the vessel to comply with the undertaking in his bill of lading.

But in actions on contracts, when it appeared to the court that there has been a mistake in the law, the court frequently grant new trials, though the plaintiff may appear entitled to a small amount only—for contracts should be duly observed, and we should hardly, I think, be warranted in treating this as a hard and vexatious action.

The defendants, besides denying the contract, which was certainly entered into, put the plaintiff also by their pleas to the proof of property in his goods.

Per Cur.—New trial without costs.

DOE DEM. GREENSHIELDS V. GARROW.

Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what has been commenced while it was in force. A sale of lands, therefore, under a spent writ of fi. fa. is void.

Special case. The question in this case was, whether the defendant's title should prevail over that of a purchaser at sheriff's sale, under an execution against the lands of one Cook, a debtor, from whom defendant took his title.

The judgment against Cook was at the suit of one Miller, and was entered in May, 1841.

A fi. fa. against goods issued at the same time, which was returned nulla bona, the return being filed on the 14th November, 1842.

On the day last mentioned, a fi. fa. issued against lands, returnable on the first of Hilary Term, 1843, which was filed on the 1st of August 1845, with a return of a levy of part; and the same day a fi. fa. issued against lands for the residue, returnable on the last day of Trinity Term, 1846.

That writ was put into the sheriff's hands on the 4th of August, 1845 No seizure was made—no lands pointed out or advertised, and none, for all that appears, known to the sheriff until December, 1846, some months after the writ was returnable, when the plaintiff's attorney informed the sheriff, that the land now in question, on which this defendant, Garrow was living, was the property of Cook, the defendant in the fi. fa., and desired him to sell it.

The sheriff did after that advertise it, and sold it on the 5th of April, 1847, to the lessor of the plaintiff, the lot being bid off by the plaintiff's attorney in the \hat{p} . fa. on his behalf. A deed was executed by the sheriff.

Garrow, it appeared, had contracted to buy the land of Cook in 1839, and had gone upon and remained always afterwards in possession, paying instalments of the purchase money, and making improvements.

On the 16th of August, 1845, Cook had made a deed to the defendant, who, it seems, had nearly paid up for the land, but not wholly. This was a few days only after the f. fa., under which it was afterwards sold at Miller's suit, was delivered to the sheriff.

It was proved, that Cook knew that the writ was out, but it was not shewn that Garrow was aware of it.

Sullivan, Q. C., for the lessor of the plaintiff. He cited 2 Burr. 660; 2 Saund. 72, note 3; 5 M. & W. 631; 9 M. & W. 774; 1 D. N. S. 793, as supporting the sheriff's deed.

P. M. Vankoughnet, for the defendant, relied upon 1 Cl. & Finelly, 77. Robinson, C. J., delivered the judgment of the court.

Under the circumstances of this case, there was no dishonesty in Cook's desiring to vest the legal title in Garrow, rather than that the land, which he had now nearly paid for in full, should be sold from under the beneficial owner to pay his (Cook's) debts.

There can be no question that the sheriff's deed, made under such circumstances, could not transfer the estate; for whatever other questions may be ingeniously started in the case, it is sufficient to say, that nothing can be done upon an execution after it has ceased to be current, unless for the purpose of perfecting what had been commenced while it was in force, and that under the fi. fa. in this case nothing whatever was shewn to have been done—nothing to connect the process with the land.

In support of a purchaser's title under other circumstances, the court may presume some formalities to have been observed, which must be supposed to have been complied with, if the sheriff did his duty; but here it is sworn by the sheriff, or, which is the same thing, by his deputy who acted in the sale, that he did in fact no act whatever under the \hat{p} . $f\alpha$., until long after it was returnable, and it is plain he could not have intended to do any act, for he knew of no property he could seize. And if there were not this express evidence to the contrary, it would be against all principle, to entertain presumptions for the purpose of defeating the title of a bona fide purchaser in possession, who could not have bought in fraud of judgment creditor, for he had become the equitable owner of the land some years before.

If the sale made here could be upheld, then of course it must follow, that a writ, under which there had never been any idea of acting while it was in force, could be taken up ten years afterwards, and a sale made under it, for there can be no line of distinction drawn between writs that have wholly lost their force.

Per Cur.—Postea to the defendant.

DOE EX DEM. MCWILLIAMS V. WHEELER.

The court will not grant a new trial in ejectment, on the ground of the very unsatisfactory nature of the evidence upon which the jury decided, when it appears clearly to the court, that neither the plaintiff nor defendant will take the trouble to offer to the jury such conclusive evidence upon the disputed fact, as is easily within their reach to produce. Ejectment for lot No. 12 in the 3rd concession of King.

The facts of this case have been before reported. See vol. 3, p. 165. Upon the motion and argument for a new trial.

ROBINSON, C. J., delivered the judgment of the court.

This is a continuation of the contest about the title to land granted by the crown to Hephzibat Wheeelr in 1802, which has already been several times before the court.

The last verdict in favour of the defendant, Wheeler, who was plaintiff in former actions, being confirmed, and the possession being changed accordingly, this lessor of the plaintiff has now brought ejectment against him, making title as devisee of the patentee, his mother.

It was upon this trial admitted, that the patentee was legally married to Henry Barton, on the 21st of November, 1796, a fact which, with the most ordinary degree of diligence, could have been ascertained with certainty, before the first trial respecting this property took place, to the saving of a good deal of expensive and useless litigation.

Now the dispute is chiefly about the time of Barton's death, a fact which is, with as little necessity, left to stand on doubtful and unsatisfactory evidence, though Barton died in this province on his own property, where he had been living, in the midst of a populous settlement, and was an officer of the militia at the time of his death.

We can only account for this apparent indifference about the obvious means of obtaining precise information, by supposing, that each party apprehended that the truth would turn out to be unfavourable to his side of the case, and preferred taking their chance of such conjectures as the jury might form.

That, however, is not the way in which parties should go before a jury, and, so far as the case may be forced to turn on the time of Barton's death, I should not be disposed to relieve either party from the effect of such verdict as the jury thought proper to give upon the vague evidence before them.

The necessity of ascertaining the time of Barton's death arises from this, that if he were yet living when the patentee, his wife, who was living separate from him, and cohabiting with Caleb McWilliams, made her will (if any were made), then the will would be void, otherwise its effect in this action would require to be determined.

As to the proof on that point, plaintiff's witness swore, that he was in in the part of this province where Barton had lived fifteen or sixteen years ago, and the people there all said he was dead; that would shew him to be dead about 1832 or 1833; the will on which plaintiff relies was proved to have been made on the 24th of November, 1839.

Defendant produced a witness, his brother, who swore, that he had himself seen Barton alive in Cobourg on the 20th of November, 1839. This would shew him to be living four days before the will was made, and the refore would seem to be tolerably good evidence (if believed) that he was living when the will was made, which would disable the patentee from devising by reason of her coverture. And there was some evidence, though very vague, to shew that he was probably living in 1840.

On the whole, the evidence on both sides, respecting the time of his death, seems to me to be deserving of little or no credit; and it is remarkable, that the parties should neither of them have taken the trouble

since the trial, and with a view to this application, to ascertain and shew conclusively how the fact really is. If Barton was alive in the Eastern District in 1839, it could be as easily proved as any fact whatever; and it is absurd that we should be discussing probabilities at the expense of these suitors, in respect to a fact that could be placed beyond all doubt by the most ordinary kind of enquiry.

I shall trouble myself then no further about the fact, but assume that it is as the jury have found it, and that he was not living on the 24th of November, 1839, since the defendant cares nothing about discovering the truth; and if it it be otherwise, the defendant must, so far as it may depend on that, bring, if he is advised, a new ejectment.

Now, assuming Barton to be dead on 24th November, 1839, the patentee was legally capable then of making a will, and the jury find that she did so, and devised some portion of the land to the lessor of the plaintiff. He claims the whole lot; the proof of the will, such as it is, would shew a devise to him of the north-east quarter only. The parties remain indifferent to the truth in that respect as in others. The verdict is general, but of course the plaintiff could only get possession of that to which he showed title.

As to the proof of the alleged will, nothing could well be less satisfactory than the evidence. It is indeed peculiarly unworthy of confidence on several accounts, but the veracity of witnesses is a point of which the jury are the judges.

There was evidence given sufficient to prove that a will was made in November, 1839, by the patentee and her husband, devising the northeast quarter of this lot to the lessor of the plaintiff, that she died without having revoked or cancelled it.

The destruction by the husband or any one else of this will afterwards, could not have the effect of divesting the estate of the devisees, and therefore I cannot, on any legal ground, say that the verdict is wrong.

The defendant has moved for a new trial, on the ground that the verdict is contrary to law and evidence and the judge's charge, and for misdirection; but we are all of opinion that there is no clear ground on which we can set aside the verdict. No one, from the nature of the evidence, can feel confident on which side the justice of the case lies. Much or most of the evidence is of a most unsatisfactory kind, and it must be left to the defendant to do as he may be advised in respect to any further proceedings, taking proper measures to place the time of Barton's death beyond question, if it will be in favour of his claim to do so.

Per Cur.—Rule discharged.

KEELE V. RIDOUT.

Under the new Registry Act, 9 Vic. ch. 34, the registrar has no right to charge a fee for the entry he makes in the margin of the memorial.

Assumpsit. Declaration. First count for money had and received. Plea, non-assumpsit.

Special case. This action was brought against the defendant, who is registrar of the County of York, Home District, and was so when action brought, and at the time of the alleged grievances.

The plaintiffs paid to the defendant all fees claimed by him on registration of three deeds of land, situated within the County of York aforesaid, which they produced and offered for registration at the office of the said registar at Toronto, including three several sums of 2s. 6d. for the registar's certificate to be endorsed on each of the said deeds of such re-istration; and including also three several sums of 2s. 6d., which they paid under protest in respect of the same deeds, and which the defendant claimed and demanded of right to be due, and insisted on being paid to him previous to registration, for a certain certificate, entry or memorandum, in respect of each of the said deeds, under the 9th Vic, ch. 34; but which certificate, entry or memorandum it was admitted was not in any of the cases given to the plaintiffs, or to any other person or persons by the registrar, but consists of a certain certificate, entry or memorandum, made by him in the margin of the memorials of each of the said deeds, of the number of the day of the month and year, and hour or time of the day when such memorials respectively were registered, according to the eighth section of the said act.

And said memorials, with such marginal entries, were kept in the registrar's office, and not given to the plaintiffs, such several entries or memoranda not being required by or made at the request of the plaintiffs, but made by the registrar under this act.

For the above entries or memoranda on the memorials in question, the defendant claimed to be entitled to the fees in question under the said Registry Act. Whereas, on the contrary, the plaintiffs contended, that he had no right to claim, demand or take of the plaintiffs the fees in question, for such alleged services. It was admitted, that if the defendant was not legally entitled to the fees in question, this action was well brought. And it was agreed, that the court might give judgment for the plaintiff for 7s. 6d. damages, or for defendant generally, or direct a nonsnit, or judgment by confession, or nil dicit, as to them might seem advisable.

A. Wilson for the plaintiff.

J. H. Hagarty for the defendant.

The argument of counsel fully appears in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

The question that arises here is, upon the right of county registrars, under the new Registry Act of 9 Vic., ch. 34, to charge, in respect of the entry directed by the 8th chapter of that act to be made in the margin of every memorial, of the day of the year, and hour, when the same was registered, such fees as are allowed by the 16th clause of that act "for every certificate given under and by virtue of the act."

The same entry was directed by the former Registry Act, 35 Geo. III., ch. 5, sec. 5, to be made in the margin of every memorial, and in the same form of words, but the 9th clause of that act, which appointed the fees, gave no charge for it as for a certificate, or in any shape.

That clause did allow a fee, 2s., "for every such certificate or copy given out of the office," and nothing having been spoken of in that act as a certificate, but the certificate which the registrar was directed to endorse on the deed and certificates of search, the word "such" could of course apply only to those, and therefore the registrar could not conceive that he could claim a fee for writing on the memorial a memorandum of the

day and hour of registration, as being a certificate out of the office coming within the 9th clause. Occasion, it seems, has been given for raising the question now submitted to us by a difference between the language of this 9th clause of the old act, and of the 16th clause of the late act 9 Vic. ch. 34.

The 8th section of the new act corresponds closely with the 5th sec. of the former act, in regard to the direction, "that every memorial shall be "numbered, and that the day of the month and year, and hour of the "day, when any memorial is registered, shall be entered in the margin of "the registry books and of the said memorial."

But the 16th clause of the new act (which is the fee clause) differs from the fee clause of the former in this, that after allowing so much per hundred words for recording the deed, it adds, "and the like fees for every "certificate (except the certificate in the margin of the registry book) given "under and by virtue of this act and no more."

Why the legislature should have called the entry in the margin of the registry book a certificate does not appear, for neither statute had applied that name to it in any other place. It seems as if the legislature were apprehensive that the registrar would treat it as a certificate, and so claim a fee for it; and that they designed to anticipate him by expressly declaring that he should not charge for that as a certificate.

But, having called that a certificate in this prohibiting parenthesis, and only for the purpose of providing that no charge shall be made for it, they have afforded room, it seems, for contending, that the entry on the margin of the memorial, though never taken to be a certificate before, is now raised to the rank of a certificate, because it is as much so as the minute in the margin of the registrar's book, to which the legislature has now given that name; and that as the same statute has not declared, that no charge shall be made for such 'certificate,' it must follow that it comes under the comprehensive words in the 16th clause, "every certificate given under and by virtue of this act," while it clearly does not come within the only exception made; and this conclusion is thought to be strengthened by the new act having omitted the words "given out of the office."

The argument is an ingenious one, and seemed to have satisfied some of the registrars, but, considering the legal principle, that every charge i mposed by law on the subject in the shape of a tax or fee, must be by clear and express words, I apprehend the ground is too weak for a court to pronounce it sufficient. The certificate on the deed is a formal document to be signed by the party, in which a fact is to be certified in a full and perspicuous form, so that it may be received as a statement of that fact in a court of justice, when it is made evidence. The minute on the margin of the memorial is a mere memorandum for the office, and may be only thus, "No. 1000, registered 1st January, 1848, 1 o'clock, P. M." I do not believe the legislature meant to allow 2s. 6d. for that; and the more reasonable construction to give the act is, that they did not intend the record of entry to be made in the margin of the registry book, to be charged for as a certificate, nor for the same reasons the similiar entry made in the memorial, neither of which in truth is a certificate at all, but is a mere minute of the affidavit, to enable him to refer from one

entry to another, or to preserve a double means of reference in case of loss of one or the other.

It is possible that the legislature meant to allow such a charge as is contended for in this case, and if they did, they can explain their meaning so as to remove doubt, but, looking at the act as it stands, I do not so construe it, and I think it was not intended to have such effect. It is not a certificate "given" but a certificate kept.

Fer Cur.-Postea to the plaintiff.

ALEXANDER V. BROWN V. GARRET AND ECCLES.

The plaintiff sued upon a bill of exchange, drawn by A. on B. 1st of April. 1847, for 30L, payable to his own order in uinety days, and accepted by B. payable at Bank of Montreal. He averred that A. endorsed the bill to C., and C. to him, the plaintiff. The defendant, A., pleaded, as to the 15L part of the sum claimed, that he made and delivered the bill to plaintiff, who accepted the same from him. on the understanding that he was to collect it, and apply 15L out of the proceeds to pay that amount due to plaintiff; wherefore, except as to 15L, there was no consideration for making the bill of exchange. Demurrer to plea. Held per Cur., plea bad.

The plaintiff sued upon a bill of exchange drawn by Eccles on Garrett the 1st of April, 1847, for 30%, payable to his own order in ninety days, and accepted by Garratt, payable at the Bank of Montreal.

He averred that Eccles pleaded, as to 15*l.*, part of the sum claimed in this count, that he made and delivered the bill to plaintiff, who accepted the same from him, on the understanding that he was to collect it, and apply 15*l.* out of the proceeds to pay the amount due to plaintiff by defendant. Wherefore, except as to that 15*l.*, there was not any consideration for making the bill of exchange, and concluded to the country.

Gorham for the demurrer, contended that the plea was bad upon the following grounds:

- 1. That the said plea, although professing to be pleaded in bar of a part of the cause of action in the first count mentioned, was not confined in its application to the said first count, but was pleaded to the whole declaration, and if so pleaded was not an answer to the declaration.
- 2. That the said plea, was also bad, inasmuch as it was inconsistent with itself, admitting that the plaintiff accepted the bill of exchange on the terms and conditions that he should collect the amount of the said bill, and at the same time assuming to shew that the plaintiff had no right to collect the amount of the said bill, or at least that he had no cause of action beyond 15*l*.
- 3. That the said plea was no answer to all the monies mentioned in the first count, but merely to 15*l*., parcel of the monies therein mentioned and the said plea could not be considered an answer even to the 15*l*., parcel, &c., for the said plea expressly admitted the plaintiff to have a cause of action to the amount of 15*l*, which 15*l*, the plea was only an answer to. Therefore the said plea was in fact a mere admission of the plaintiff having a cause of action to 15*l*.
 - 4. That the said plea was also bad in this, that the first count of the

declaration alleged, that the said Henry Eecles indersed the said bill therein mentioned to one Thomas G. Ridout, and that the said Thomas G. Ridout then indorsed the same to the plaintiff; yet the said plea was pleaded as if the defindant, Henry Eecles, had directly indorsed the said bill to the plaintiff, instead of to the said Thomas G. Ridout (who afterwards indorsed it to the plaintiff), which amounted to an argumentative traverse of the indorsement by the said Thomas G. Ridout in payment of such indebtedness.

He cited in support of these objections, 3 A. & E. 669; 1 Scott. 265; 1 Cr. & M. 538; 3 P. & D. 404; 9 A. & E. 499. Upon the last he cited 1 Q. B. R. 498; Step. Plea. 422; 12 A. & E. 455.

H. Eccles, contra, cited Bank of Montreal v. Humphries, 3 U. C. R. 463;
6 M & W. 291; 14 M. & W. 291.

ROBINSON, C. J., delivered the judgment of the court.

I think the plea is bad, for defendant does not say that he indorsed the bill to plaintiff, which alone could enable him to sue upon it, if he took the bill from the defendant, and he does not traverse plaintiff's statement, that he, Eccles, indorsed the bill to Ridout, and that the plaintiff took it by indorsement from Ridout; so he neither denies the plaintiff's statement of title, by shewing that he became holder of the bill by direct indorsement from him the payee, nor does he traverse the title which the plaintiff makes to the bill in his declaration, nor does he deny his title as holder directly or indirectly.

If the defendant, Eccles, merely delivered the bill to the plaintiff, as he says, we must take him not to mean to state that he indorsed to him. And as he does not not deny that he indorsed the bill to Mr. Ridout, and that plaintiff took it from Ridout as indorsee, it is quite inconsistent with the plea, that Eccles may afterwards have become possessed of the bill, and put it into circulation, so that the plaintiff may have got it in the way of business, paying full value for it, and the defendant may also have got full value for it when he transferred it to Ridout.

The defendant only pleads, that he got no consideration for making the bill, not that he did not get value for it when he indersed it to Ridout, which indersement he does not deny.

The second count of the declaration, which is demurred to, we think is perfectly good. It is not argumentative, at least not in any greater degree than the form of declaring on the common counts sanctioned by our rule.—Cameron's New Rules, 52.

Per Cur.-Judgment for plaintiff on demurrer.

WATSON V. GAS LIGHT COMPANY.

Where an offer was made by the defendant's counsel at the trial, and which it was said was to be carried into effect without reference to the verdict, and the jury, being influenced by this statement, gave a less amount of damages than they might otherwise have done; the court, upon the refusal of the defendant to sanction the offer of his counsel, set aside the verdict, but with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement.

In this case *Hector* obtained a rule for a new trial, with costs to be paid by the defendants, because the jury were misled by offers of compromise, which the defendants' counsel stated would be fulfilled, let the verdict be what it might, which offers were made in court at the trial, and for the purpose of influencing the jury in respect to the amount of damages, but which offers the defendants have refused to fulfil since the trial.

The action was case for a nuisance.

Defendants pleaded the general issue. 2ndly. Judgment recovered in a former action for the same injury. To which plea plaintiff new assigned, and defendants pleaded the general issue to the new assignment.

Third and fourth pleas demurred to: these were to the second count.

Verdict for plaintiff on first count, and 5l. damages, and for defendant on second count.

J. Lukin Robinson shewed cause. He contended that as there was no wilful design on the part of the counsel to mislead the jury, the defendant was not entitled to a new trial without costs; that the costs should be made to abide the event. He cited 10 A. & E. 590; Hullock, 391.

Robinson, C. J., delivered the judgment of the court.

There is no doubt, from the affidavits, and what is admitted by defendants' counsel, that it was openly stated at the trial, and for the purpose of influencing the jury to give moderate, if not nominal, damages, that the defendants would give to the plaintiff a title in fee for another lot on the Bay of Toronto, in exchange for that of which he holds a lease, and which he complains has been injured by the nuisance occasioned by defendants' gas works; that the jury gave 5l. damages, assuming that defendants would act as their counsel engaged they should do. But the defendants decline to do what their counsel believed they would do, and under such circumstances, we have only to consider on what terms a new trial ought to be allowed.

Certainly, the verdict so rendered should not stand; we grant a new trial with costs to abide the event. If it should not ultimately appear that the plaintiff has good ground of action, then he will not recover the costs of the last trial, but if he succeeds ultimately he will have the costs of both.

Per Cur. - New trial granted, costs to abide the event.

MARTIN V. GWYNNE.

Under the 8 Vic., ch. 13, sec. 51, a writ may go the District Court to try an issue in which an attorney is defendant.

Where the declaration claimed 75l. for work and labour, but the bill of particulars only 19l., the case is brought within the limits of the act, and may be referred to.

The defendant moved to set aside a judge's order for writ of trial, and all subsequent preceedings thereon, on the ground that no such writ could legally issue in this suit, or for a new trial on affidavits.

Durand shewed cause. He cited The Bank of Montreal v. Burritt, 3 U. C. R. 375, as in point, also Dwarris on Stat. 720.

ROBINSON, C. J., delivered the judgment of the court.

In the Bank of Montreal v. Burritt, an attorney, we determined, that a writ may go to the district court to try an issue in a case in which an attorney of the court is defendant, as well as in other cases, for that there is no impediment occasioned by his privilege as an attorney.-3 Cam.

It is true, that there is no serviceable process, as in ordinary cases, on which to indorse the amount claimed by the plaintiff, in literal compliance with the words of the act. But the provision is a remedial one, intended to save expense and time to suitors, and should be constructed liberally; and though in this case the declaration claims 75l. as due for work and labour, which, if we looked no further, would show the case to be beyond the limit in the clause, yet the particulars delivered, and which were annexed to the record at the time of the trial, shewed as clearly as any indorsement on the writ could do, that all that the plaintiff sought to recover in the action was 19%.

The affidavits, we think, lay sufficient ground for a new trial on payment of costs.

Per Cur.-New trial on payment of costs.

BARNES V. MCKAY.

Where a defendant is sued upon a promise to continue a former agreement, which, at the time of the alleged promise, is about expiring—the plaintiff should state in his declaration the precise terms of the former agreement, and also aver that the terms so stated composed the whole of the tormer agreement.

In an action of assumpsit, the promise of defendant should be alleged in direct terms; the averment, therefore, that defendant addressed a letter to plaintiff, in which he promised, &c., not being a precise allegation that defendant promised, but that the letter says he did—is bad.

Declaration .- That before and at the time of making the promise hereinafter mentioned, plaintiff kept a depot in Toronto, for draft and bottled ales, and sought to obtain his livelihood thereby. And defendant was and is a brewer of ales in Toronto, and had sold to plaintiff ales in draft and bottles, and had, previous to 13th March, conferred on plaintiff the exclusive right of bottling defendant's ales, and selling same for a good consideration.

And on 13 March, 1847, a prior agreement, for the exclusive bottling and vending ales, was about expiring, and defendant proposed to plaintiff to renew the same. Whereupon defendant, on 13th March aforesaid, wrote and addressed a letter to plaintiff in words to the effect following: that he, defendant, had received plaintiff's reply to defendant's proposition for bottling defendant's ales; and defendant promised to continue engagement to 30th Sept. then next, by plaintiff binding himself to take at least 1400 gallons of ales for bottling during that period; that there could be no No. 2 ale bottled for use between 1st July and 1st Oct.; but if bottled during that time to be at risk of defendant. Defendant bound himself not to sell ale from 13th March to 30th September to any one else, for the purpose of bottling for sale in the city of Toronto, nor would be sell any in bottles. Defendant further agreed to supply the plaintiff with 50 gallons per week of draft ales, the same to be delivered by driver of defendant wherever in the city of Toronto plaintiff should request the same. That casks should be paid for by

plaintiff, if not returned to defendant in forty days. And that one-third of price of bottled and draft ales should be paid for on delivery, and the other two-thirds by bill or otherwise at end of every three months. Plaintiff averred, that on 13th March aforesaid he agreed to the same, and bound himself to take 1400 gallons of ale for bottling during that period · aforesaid, and to pay for same in manner aforesaid. Plaintiff averred, that on 1st April, 1847, defendant brewed large quantities of ales for bottling and draft, to wit, 50,000 gallons. And although plaintiff had bound himself to take at least 1400 gallons of ale, and was always willing and offered to pay for the same according to terms aforesaid, and had offered to do what was required of him by said agreement; and although plaintiff had requested defendant to deliver 1400 gallons of ale aforesaid, and was ready to receive and pay for the same; vet defendant, not regarding said promise, but contriving, &c., to injure defendant, neglected and refused to comply with aforesaid promise. And although plaintiff, on, to wit, 1st April, requested defendant to supply him with ales, to wit, with 50 gallons per week of draft ales; and requested defendant to send his driver with the same to be delivered within the city of Toronto, and offered to pay for the same according to agreement; yet defendant wholly neglected and refused so to do, and would neither supply plaintiff with draft ales on request and offer to pay, nor deliver or cause to be delivered the same or any part thereof. And plaintiff averred in breach of said agreement, to wit, on 1st Aptil aforesaid, that defeddant sold large quantities of ales, to wit, 10,000 gallons of ale for bottling for sale in Toronto aforesaid; and also sold in bottles, to wit, 10,000 dozen bottles of ale, to divers persons in Toronto, and among others to Thompson, Bethune and Bell of the city of Toronto aforesaid, whereby plaintiff had lost great gains which he would have drived from sale of ales aforesaid, and from his said calling and vending ales aforesaid; and plaintiff had lost his business, being obliged to relinquish and abandon the same, to plaintiff's damage of 500%.

Demurrer to declaration. 1. That there was no positive averment therein contained of any contract having been made by the defendant.

- 2. That the contract intended was set forth argumentatively, and by the averment of facts amounting to mere evidence of contract.
- 3. That the first part of the supposed contract, as set forth in the said declaration, was ambiguous and uncertain in its term and meaning, and shewed no legal obligation for the performance by the defendant of anything in particular.
- 4. That the breach thereof assigned was too large, inconsistent with, and unsupported by the said contract, and the performance by the plaintiff of the condition precedent was not set forth with sufficient certainty, in that it was not shewn how the plaintiff bound himself, &c.
- 5. That the second part of the said contract or promise was inconsistent with the preceding and subsequent parts of the declaration, and the declaration is therefore repugnant in this, that by the said second part or promise the defendant agreed not to sell alone to any one for the purpose and during the period therein mentioned; whereas by the other parts of the declaration the plaintiff complained, that during the same period and for the same purpose the defendant agreed and ought, but refused to sell ales to the plaintiff; and that the breach, in respect of that part

of the declaration, was insufficient and inconsistent, and unsupported thereby, and amongst other reasons, for that it did not appear but that all the ales, which the plaintiff did sell as therein mentioned, were to the plaintiff himself pursuant to his said promise, nor that the defendant broke his promise during the said period.

- 6. That the last part of the said contract or promise, to be performed by the defendant as set forth, was uncertain in its terms; and it was not stated in and by the declaration wherein the defendant was to have delivered the ales, in that part of the said declaration mentioned, or that the time of delivery was limited or had elapsed before this suit was commenced, or whether the same were to be delivered on request, or that any request was made at any particular time. And for that it was in and by the declaration alleged, that the defendant promised that the said draught ales should be delivered by the defendant's driver, wherever in the city of Toronto the plaintiff should order the same to be delivered; yet the averment of the plaintiff's request of performance thereof, in that he requested the defendant to send his driver with the said ales, to be delivered within the limits of the city of Toronto, the said request being too large, in respect both of sending the driver with the said ales, and of the place of delivery, and therefore no good breach was assigned.
- 7. That also, there was no good or sufficient consideration shewn for all or any of the defendant's promises, nor were the said promises or causes of action alleged to have been made by the defendant, or to or with the plaintiff, nor was any reciprocal promise shewn to have been made by the plaintiff or to the defendant.

H. Eccles, for the demurrer, referred at length to the several grounds of demurrer mentioned above. No cases cited.

R. P. Crooks contra.

Robinson, C. J., delivered the judgment of the court.

This declaration is in our opinion, objectionable on most of the grounds assigned, some of which are substantial, and others merely formal. The most material are those which relate to the statement of the defendant's contract, because on that the whole cause of action is founded; and if that were sufficient, it might be found that the declaration, as to one or more of the breaches could be supported.

The plaintiff sets out, by referring to an agreement that was about expiring, and then states a correspondence, in which defendant promised to continue it; but what was the precise nature of that agreement is not stated, and therefore we cannot see what it was that defendant promised should continue. It is true, some precise terms are afterwards stated, but it is not alleged that they composed the whole of the former agreement, and we cannot tell how they might have been controlled by other parts of the agreement.

In most cases a party need only state as much of an agreement as is material to his purpose, but as this is stated, it appears to me to require some further explanation of the nature of their former agreement.

Then it is not stated in the direct terms that an action of assumpsit requires, that the defendant promised; but it is said that in answer to a reply to a proposition of defendant's, neither the reply nor proposition being set forth, the defendant wrote and addressed a letter to plaintiff, in which he promised, that if plaintiff would bind himself to do one thing,

the defendant would promise not to do certain things on his part, and did promise to deliver ale for the plaintiff in certain quantities, wherever he should order it to be delivered in the city of Toronto.

In Plowden's Reports, 143, there is a case of Browning v. Beston very like this as regards this objection, and the court clearly held such a way of laying a contract to be bad. There it was averred, "that in a certain "indenture made by the plaintiff, it was contained, that if it shall happen, "&c., then that the said defendant covenanted and granted." And the court says, "that is not a precise allegation that the defendant did covenant, "but is an affirmation, that that indenture says so and the party himself "ought to say so, and not say that the indenture says so, for this saying, "that it is contained, in the indenture, is not an affirmation of the thing "which is mentioned to be contained in the indenture." (a)

If in this case the letters and replies ended in the acceptance of a proposition, and the completion of a contract, then the plaintiff should have stated, that in consideration of plaintiff undertaking, &c., the defendant promised, &c., and the letters would have been evidence of it.

The defendant could not make the promise when he wrote the letter, he did not then know whether the plaintiff would bind himself to take 1400 gallons, so no contract was made by his letter, and no subsequent promise is stated.

The breaches were also insufficiently assigned. The plaintiff does not shew that he limited his demand to the 50 gallons a week, which was all he could insist upon. And a special request with time and place should have been stated, as well as a request to deliver at some particular place or places, for a request to deliver in Toronto would be too general for the contract, and would not be reasonable.

I think also at present, that as to the breach selling to others, the plaintiff should have stated it with particulars of time and place.

Per Cur. - Judgment for the defendant on demurrer.

WRIGHT V. BENSON.

Where the plaintiff had bound himself to advance money to A. upon certain conditions, and the defendant had in the same bond guaranteed the plaintiff the payment of such advance—the plaintiff, in suing the defendant upon the bond for the non-fulfilment advance—the plaintiff, in suing the defendant upon the bond for the non-fulfilment of his guarantee, shou does out with certainty what the conditions were on which A. was to obtain the money from him (the plaintiff)—as otherwise no certain is sue could be taken upon the question, whether A. had performed the conditions or not—or whether the plaintiff nad done what he agreed to do, viz, to advance the money of the conditions agreed upon—the simple averment, therefore, that A. had not kept the condition—without stating what the conditions were—is bad.

A plea, also stating that the p aintiff had not kept all the conditions on his part, when it nowhere appeared what they were is also bad.

Where the plaintiff by his bond was either "to secure or advance" the money, a plea, stating that the plaintiff had not "secured and advanced," is bad.

Debt on bond. For that whereas the defendant heretofore, to wit, on &c., by his certain writing obligatory, sealed with his seal, and now shewn to the court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to the plaintiff in the

sum of 500l: of lawful money of Canada, to be paid to the plaintiff. And the plaintiff, according to the form of the statute in such case made and provided, says. that the said certain writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that whereas the said Samuel Benson and the said Paul Wright had jointly and severally agreed to become security, and to advance or cause to be advanced a certain sum, amounting to 500%, for the space of two years from the date thereof, to one John Benson of Napanee, upon certain conditions and agreements, to be per. formed and kept by the said John Benson, and that whereas the abovenamed Paul Wright was bound unto the said Samuel Benson, by his bond and obligation, for the seenring and procuring a certain sum amounting to 2501, part of the said sum of 5001, for and within the term aforesaid; and that whereas the said Samuel Benson had agreed to hold the said Paul Wright harmless, in case of failure in payment of the said sum of 2501., to be advanced as aforesaid to the said John Benson by the said Paul Wright, it was and is declared to be the condition of the said certain writing obligatory, that if the said Samuel Benson should indemnify and save harmless the said Paul Wright, his executors and administrators, for the said 2501., to be by him secured or advanced to the said John Benson in manner and during the term aforesaid, then that obligation to be void, otherwise that the same should be and remain in full force and effect.

And the said Paul Wright saith, that he, the said Paul Wright, hath performed, fulfilled and kept all and every the stipulations, acts and things on his part to be performed, as in the said recited agreement and recital to the said writing obligatory mentioned, and hath secured, procured and caused to be advanced to the said John Benson, the said sum of 250%. in manner and during the term in the said recital and condition of the said writing obligatory mentioned and referred to.

And the plaintiff further averred, that the said John Benson, hath not performed or kept the said conditions and agreements upon which the said sum of 250*l*. was secured, procured and caused to be advanced to him, as mentioned in the said recital.

And the plaintiff further averred, that the said John Benson, contrary to the said conditions and agreements, hath failed in payment of the said sum of 250l., so secured, procured and caused to be advanced to him, in manner and for the term aforesaid, and hath not as yet paid the same. Yet the said l'aul Wright saith, that the said Samuel Benson hath not indemnified and saved harmless him, the said Paul Wright, for the said sum of 250l. by him secured and advanced to the said John Benson as aforesaid, but, on the contrary, and contrary to the conditions of the said certain writing obligatory, and to the terms of the agreement therein recited and referred to, the said Samuel Benson hath allowed and suffered the said Paul Wright to be put to, and to suffer great damage, harm and loss, by reason and on account of his, the said Paul Wright's, having secured, procured, advanced and caused to be advanced to the said John Benson, the said sum of 250%, as aforesaid, to wit, the loss of the sum thus secured and advanced to the said John Benson as aforesaid, and the injury to him, the said Paul Wright, by reason of being, from the time the same ought to have been paid, hitherto deprived of the use and benefit of the same, and of divers great gains. By reason whereof, &c. Damages, 500l.

Plea. That the plaintiff hath not performed all and every the stipulations, acts and things on his part to be performed, as in the said recited agreement and recitals to the said writing obligatory mentioned, nor hath he secured, procured and caused to be advanced to the said John Benson the said sum of 250%, in manner and during the term in the said recital and condition of the said certain writing obligatory mentioned and referred to, and of this the defendant puts himself upon the country.

Demurrer to plea. 1. That the said plea is no answer to the plaintiff's declaration, nor to the breach by him above therein assigned, for that the defendant does not in his said plea deny that the plaintiff suffered loss or was damnified, but merely denies the performance by the plaintiff of certain agreements, and leaves his indemnity to be arrived at only by argument and implication.

- 2. That the defendant in his said plea tenders a traverse too large; he traverses, that the plaintiff performed all and every the stipulations on his part to be performed, and also his having secured, procured and caused to be advanced the sum therein mentioned, but although all the stipulations and terms were within the defendant's knowledge, he does not say what they were, or how they, or any of them, had been broken.
- 3. That the said plea is alternative, multifarious and double, in this, that the defendant therein traverses that the plaintiff performed all the stipulations on his part, and also his having secured, procured and caused to be advanced the sum therein mentioned, and thus seeks to raise distinct issues, by alleging that he did neither the one nor the other.
- 4. That defendant in his said plea tries to traverse all the plaintiff's averments conjunctively.
- 5. That the defendant therein endeavours to traverse matter not properly traversable, in this, that the plaintiff performed all and every the stipulations on his part, whereas advancing or causing to be advanced the sum of 250L, as in the agreement mentioned, was all that the plaintiff was to perform.
- 6. That she said plea is uncertain and informal, in this, that it does not traverse any averment of the plaintiff, in manner and form as in the said declaration alleged, but leaves it uncertain whether the defendant intended thereby to put in issue any of the plaintiff's averments.
- 7. That she said plea is no answer to the said declaration, but evasive, for that it does not deny or confess and avoid the plaintiff's cause of action.
- 8. That the plaintiff cannot properly take issue on the said plea, for that it is repugnant, and in other respects insufficient, &c.
- 9. That the said plaintiff cannot properly join issue on the said pleafor that it would throw upon him the burthen of a greater amount of proof than would be necessary to support his case, in this, that the defendant denies that the plaintiff secured, procured and caused to be advanced the sum therein mentioned, whereas the plaintiff might have done either, or some, but not all of these acts, and either would be sufficient for him, as is evident from the words of the said condition, which are: if the said Samuel Benson shall indemnify and save harmless the said

Paul Wright, for the said sum so to be secured or advanced, thus shewing that the plaintiff might have elected to do either, but an issue on the defendant's plea would compel him to prove that he had done all.

- 10. That the said plea contains two distinct traverses of the same matter in this, that the defendant therein denies that the plaintiff performed all so on his part to be performed; and, independently of, and separately from that denial, be again denies that the plaintiff secured, procured and caused to be advanced the sum therein mentioned, whereas the plaintiff's averment, that he performed all on his part to be performed, and that he did secure and procure the said sum, mean, and essentially are one and the same.
- J. H. Hagarty in support of the objections mentioned above on demurrer cited Cameron's Digest, 57; 1 Saul. 117 (a); 1 U. C. R. 428; 3 U. C. R. 157; 1 B. N. C. 644.
- P M. Vankoughnet contra. The condition in the bond shews, that the advancing the money was all the plaintiff had to do, and so the plaintiff himself contrues it, as his causes of denurrer prove; then, if so, what is said about the other things to be performed on his part is to be looked upon as superfluos and surplusage.

ROBINSON, C. J., delivered the judgment of the court.

We are of the opinion that both parties should amend their pleadings, without costs paid on either side.

The bond sued on is obscure, in not setting out what the conditions were on which John Benson was to obtain the money; but the plaintiff should have made that appear in his declaration, otherwise no certain issue could be raised upon the question, whether John Benson performed the conditions or not, or whether the plaintiff did what he agreed to do, namely, advance the money on the conditions agreed upon. The plaintiff says only, that John Benson has not kept the conditions, but has not stated what they were.

Then the plaintiff ought to have averred expressly, that the two years had elapsed before action brought.

The plea again is defective, in saying that the plaintiff has not kept the conditions on his part, when it no where appears what they were, so that if the plaintiff had replied that he had, there would have been no precise issue to be tried.

There may have been other terms and conditions on which the money was advanced, besides merely the repayment in two years. It may have been, that he was to have the money on favourable terms, as to interest, mode of repayment, &c., and if this repayment in two years were the only condition the defendant should have said so, or if there was some other condition which the plaintiff did not observe, the defendant should have said so, and not merely pleaded that plaintiff had not observed all the conditions, &c.

The plea is also, in our opinion, bad, in stating that the plaintiff had not secured and advanced the 250., I when, according to the condition of the bond, he was only to do the one or the other. On this point the case of Bradley v. Milnes, 1 Bing. N. C. 644, is applicable if any authority could be required. We recommend to both parties to amend their pleadings.

Per Cur .- Judgment for plaintiff on demurrer, leave to amend.

HYNES V. BURROWES.

The jury in a district court cannot try as an issue of fact, whether the Division Court gave judgment on insufficient evidence—nor whether the plaintiff aban-loned the residue of a large demand, so as to give the court jurisdiction. Where, therefore, this had been done, and the judge of the district court on a motion in term, arrested the judgment, the court above confirmed his judgment.

Appeal from the District Court of the District of Dalhousie.

The plaintiff declared upon the common counts for money lent, &c.

The defendant pleaded in his fifth plea, that in an action in the division court on the same cause of action for 10*l*, the plaintiff abandoned any excess of his demand above the 10*l*, and that the defendant in that suit had a verdict in his favour, relying upon that as barring the plaintiff's demand, in regard to the whole of this now alleged cause of action.

The plaintiff replied to this, that as to the 10L, the judge gave judgment in defendant's favour for that sum on defendant's oath alone, without other sufficient evidence, against the form of the statute. And, as to excess of the plaintiff's demand above 10L, that plaintiff did not abandon it.

Upon these issues, with others, the parties went to trial, and the jury found for the plaintiff on all the issues, and 12l. 2s. 7d. damages.

Next term the judge on motion arrested the judgment, on the ground that the replication was no answer to the fifth plea.

From this judgment the plaintiff appealed.

P. M. Vankoughnet for the appeal, cited 4 B. & C. 411; 2 Bing. 263;
5 Bing. N. C. 508; 1 Dowl. N. S. 168; Cro. Jac. 184; Cro. Eliz. 489;
1 M. & G. 882.

Richards contra, contended that the judge below had properly arrested the judgment. The jury in the district court could not try as an issue in fact, whether the Division Court gave judgment on insufficient evidence. This was the only point raised below, and the appellant could not now make other points in his favor. He referred to the 42th sec. of the 4 & 5 Vic. ch. 3, as making the judgment of the Division Court final.

ROBINSON, C. J.—I think the learned judge did right in arresting the judgment, for the jury in the district could not try as an issue of fact, whether the division court gave judgment on insufficient evidence, nor whether the plaintiff abandoned the residue of a larger demand, so as to give the court jurisdiction.

The 45th section of the Division Court Act makes the judgment of that court final, and it is certainly not examinable by a jury in the district court.

I do not see why this expensive litigation should have arisen, for it appears that the same demand of 8l. 10s. has been made the ground, and as it seems the only ground of an action in the division court, and the case there determined against this plaintiff.

MCLEAN, J.—It does not appear to me that any sufficient ground has been shewn to sustain the appeal. The propriety of judgments in the division courts, which are final, cannot in my opinion be questioned, by bringing actions in the district or other courts for the same demand.

Instead of being final, if such a course could be adopted, the higher courts would, in many instances, be called upon to review the judgments and overrule proceedings in the division courts, on the ground of some error of judgment or defect in the evidence before these courts. This is certainly the first time that I have seen it made a question for a jury, whether a judge has decided properly in a division court, in which by law his judgments are final. The appeal must be dismissed with costs.

Per Cur,-Judgment below confirmed.

TENNERY V. STILES.

Declaration on the case, for falsely alleging, that a certain hotel stood upon the land of defendant, whereby plaintiff was induced to purchase defendant's land, the defendant well knowing that the hotel was not on his land, but on other lands, to wit, lands adjoining to the defendant and belonging to the Queen. Plea; 1st. That the said hotel was not erected upon the land of the Queen, as, &c. 2ndly. That the paintiff had notice and was well aware that the false representations, &c., were false, and if dannified thereby, he was dannified of his own wrong, and through his own default. Held, per Cur., on demurrer to both of these pleas—bleas bad. Held, also, on exceptions taken to the declaration (which is given at length below)—declaration good in substance, though loosely framed.

Declaration on the case. For that whereas before the committing of the grievances by the defendant hereinafter mentioned, the defendant was the owner of a certain piece or parcel of land situate in the town of Cobourg in the district aforesaid, or was possessed thereof as such pretended owner; and whereas also, for some time previous to and at the time of the committing the said grievances, there had been erected, built and stood adjoining and nigh to the said piece or parcel of land, upon certain other lands and premises, a certain hotel, inn or taveni. of great value, to wit, of the value of 500l.; and whereas also, the defendant, well knowing such to be the facts, and being desirous to sell and dispose of said piece or parcel of land to the plaintiff heretofore, to wit on the 18th of August, 1845, proposed to sell to him, the plaintiff, the said piece or parcel of land, then fraudulently intending to deceive the plaintiff in this behalf, falsely, &c., represented to the plaintiff, that the said hotel, inn or tavern aforesaid was erected, &c., within and upon, and was part and parcel of the said piece or parcel of land aforesaid, whereas, in truth and in fact, the said hotel, inn or tavern was not standing, erected or being upon or within, nor was it part or parcel of the said piece or parcel of land, but was erected, built and stood upon, and was part and parcel of other and different lands and premises, to wit, lands and premises adjoining thereto of and belonging to her Majesty the Queen, of which the defendant was then well aware; and the plaintiff saith, that by means and in consequence of such false representations of the defendant, he was afterwards, to wit, on the day and year aforesaid, induced to and did then purchase of and from the defendant the said piece or parcel of land, at and for a large price or sum of money, to wit, the price of 600l., principally for the purpose of getting and becoming the owner of the said hotel, inn or tavern, by means of which false, &c., of the defendant's, and by means of the plaintiff having been thereby induced to purchase the said piece or parcel of land, he hath been greatly injured, and hath paid much more for the said piece or parcel of land than the same was or is worth without the said hotel, inn or tavern, and the said land has been and is wholly useless to him, and he hath also lost and been deprived of the great gains and profits which he might and would have derived from the said hotel, inn or tavern if the same had passed to him as parcel of the said land, to the plaintiff's damage of 1000*l.*, and therefore he l rings his suit, &c.

To this the defendant pleaded in his third and fourth pleas:

- 3. And for a further plea in this behalf the said defendant says, that the said hotel, inn or tavern is not erected, built or standing upon the land of her Majesty the Queen as in the declaration alleged, and of this the defendant puts himself upon the country, &c.
- 4. And for a further plea in this behalf the defendant says, that if the defendant made the supposed false, fraudulent, deceitful representations, in the declaration alleged to the plaintiff, he, the plaintiff, was well aware and had notice that the same were false, fraudulent and deceitful, and that if the plaintiff has been damnified by reason of the alleged false, fraudulent and deceitful representations he has been damnified of his own wrong, and by and through his own default, and this the defendant is ready to verify, &c.

Demurrer to third and fourth pleas.

II. Eccles contended that the third plea was bad, as amounting to an argumentative denial of the fraudulent representations complained of—astaking issue on an immaterial allegation—and as amounting to the general issue.

He also contended that the fourth plea was bad, as being hypothetical, neither confessing and avoiding, nor denying the plaintiff's cause of action.

—2 Dowl. 707.

D. B. Read contended that the causes of demurrer were not sufficiently pointed out.—Hob. 133; 1 Salk. 219; 1 Saund. 160, note 1; 3 U. C. R. 40.

He also excepted to the declaration on the following grounds:

- 1. That the action should have been in assumpsit, and not in case.
- 2. That it was not shewn that the plaintiff had rescinded the contract, but that it appeared that he still retained possession of the place purchased.
- 3. That it was not shewn that the plaintiff had agreed to purchase the house mentioned, or that he would have purchased the same.
- 4. That the damages were too remote.—10 M. & W. 160; 14 M. & W. 662; 11 M. & W. 401; 5 E. R. 449; 4 B. & Al. 387; 5 M. & W. 86.

ROBINSON, C. J., delivered the judgment of the court.

The two pleas denurred to are, in our opinion, both defective; the first, because it rests the defence upon denying, that the house referred to is on the land of her Majesty, which tenders an issue wholly immaterial.

The question is, whether it did or did not stand on the piece of ground which the plaintiff has bought, at the time when the defendant sold to him, and when he represented it as standing on that ground.

The other plea is bad, being placed hypothetically, not confessing and avoiding, nor denying the alleged misrepresentation.

The declaration has been excepted to, and it certainly has been loosely framed, but we think it sufficient in substance. The plaintiff has confounded the two parcels of land, so as to make it anything but clear, when he means one and when the other. We can understand what he means, but he certainly has not made it clear.

We think both parties should amend their pleadings.

Per Cur. - Judgment for plaintiff on demurrer-leave to amend.

RUSSELL V. CONWAY.

Where there are open running accounts between plaintiff and defendant in the district court, made up of divisible items, not exceeding in each 25*l*, the defendant can only recover by way of set-off—the difference between 25*l*, and the amount due to the plaintiff. If the defendant, however, desires to recover more than will balance the plaintiff's demand, he must give notice of or plead a set-off to the 25*l*, and claim in his plea or notice to have the amount between the plaintiff's demand and the 25*l*, allowed him.

McLean, J. dissentiente—being of opinion, that a defendant upon a set-off might recover a balance to any amount beyond the 25L—the jurisdiction of the district court not being limited, as to a defendant's set-off.

The plaintiff sued in assumpsit for 111. 12s. 3d., for his work and labour in measuring timber for defendant.

The defendant pleaded the general issue, and a set-off of 30% for board and lodging, use and occupation of apartments, and for money lent, account stated, and which he says exceeded the damages sustained by plaintiff, and out of it he is ready and willing to allow the plaintiff the full amount of his damages according to the statute. He claimed nothing extra as due to himself.

The plaintiff took issue on the set-off.

At the trial the defendant gave evidence of an account from August, 1839, to June, 1844, for 30*l*. 11s. 8d., consisting of a number of distinct items, for goods sold, meals provided, money paid, &c.

Defendant had a verdict for 20l. 0s 10d.; he proved his account in full, 30l. 11s. 8d., and a further account since that of 11l. 7s. 2d.

By consent, a verdict was taken for 20l. 0s. 10., to be reduced to 13l. 7s. 9d., if the court should think that defendant could not give evidence of a set-off over 25l., the limit of jurisdiction as to plaintiff where there has been no writing; or a verdict for plaintiff for 12l. 7s. 2d., if the defendant could not give evidence of his set-off at all being above 25l. and unliquidated.

The judge in the district court term ordered, that a verdict be entered for defendant for 13*l*. 7*s*. 9*d*., being the difference between plaintiff's demand for 11*l*. 2*s*. 3*d*. and 25*l*.

The plaintiff appealed, and contended that defendant could not give evidence of such a set-off to any extent.

H. Eccles for the appeal.

P. M. Vankougenet contra.

The argument of the respective council fully appear in the opposite judgments given by the Chief Justice and Mr. Justice McLean.

ROBINSON, C. J. —I think the defendant clearly could give evidence of so much of his open account, consisting of goods sold, money lent, &c.,

at different times, and all separate and divisible, as might be necessary for covering plaintiff's claim, and more if he had given notice that he would claim.

Here he did not offer to set off more than would balance plaintiff's claim; he could not be made to do so unless he pleaded, and his plea should express that he intended to claim a balance, where he does not mean to limit himself to meeting plaintiff's claim.

I think the defendant should here have a general verdict.

Since the plaintiff claimed only 11%, it was unnecessary in the defendant to have pleaded a set-off to a large amount, and only gave ground for questioning the jurisdiction.

If he desired to recover a verdict for any balance he might prove, he should have pleaded set-off to the 25l., and made a claim to have that amount allowed him.

Here, however, he gave no evidence of his claim, except such as proved an account stated for 31*L*, 11s. 9d., which the district court was not competent to try, there being no writing—1 Dowl. & L. 163.

But the effect of the evidence is to shew, that all the goods set down in that account were delivered, making up the account, and so each item may be taken as proved; and we do not see that defendant can be properly restrained from setting-off so much of his claim for an open, running account, as will be necessary to balance the demand proved against him, or so much, if he had claimed it in this action, as could have been allowed him without exceeding the jurisdiction of the district court.

If the defendant had attempted to give evidence of 301. 11s. 8d., as due to him upon some contract, a transaction inadmissible in its nature, and not proved by the signature of the plaintiff, then the objection might have applied.

No objection was made at the trial, or on argument here, that the defendant could not recover up to 25l., because he had not claimed more than would balance plaintiff's claims. The court, considering this, affirmed the judgment for 13l. 7s. 9d.

McLean, J.—When the defendant proved a set-off on an account stated, to the extent of upwards of 30*l*., the judge should either have directed a verdict for the defendant generally, or if the defendant claimed a verdict for the balance, the whole amount of the set-off, after deduction of the amount proved by plaintiff, should have been allowed.

I do not see that the judge could properly divide the set-off and allow 251., because the jurisdiction of the court is confined to that amount, unless in cases ascertained by the signature of the party, and reject the residue. He was bound, I think, to reject or allow all. He could not properly reject all, and admit of a plaintiff recovering a small amount from a defendant, to whom he was indebted in a much larger sum.

If the verdict had been rendered generally for the defendant, then he could in another action recover the difference between the plaintiff's demand and the amount of set-off. But if the verdict for 131. 7s. 9 l., remains in his favour, it will be conclusive, and preclude any future recovery beyond that amount.

It appears, however, to me, that the district courts cannot entertain a suit brought to recover a sum exceeding 25l., unless the amount is ascertained by the signature of the defendant, yet that in matters of

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set-off the jurisdiction is not so restricted, and that under the 1st sec. of the act 11 Geo. IV., ch. 3, a defendant, having given notice of or pleaded a set-off, may recover any difference which he may shew to be due to him, between the plaintiff's demand and the amount of his set-off.

The clause referred to declares, that in any action thereafter to be commenced in the Court of Queen's Bench or district courts, if the defendant, having given notice of or pleaded a set-off, shall on the trial of said action prove a sum due to him, it shall be lawful for a jury to render a verdict for the defendant, to the amount of the difference of their respective claims, and for such defendant to enter up judgment for such sum, besides his costs and charges, and to have execution therefor.

This clause does not limit a defendant's right to recover to any specific sum, or confine it to a sum within the jurisdiction of the district court.

By the same act the same proceeding is authorized in the Courts of Requests then existing, but care is taken to restrain the court from taking cognizance for any demand advanced on the part of defendant, which, from its nature or amount, would not come within the jurisdiction of the court, if brought forward on the part of the plaintiff.

In passing this latter clause, it could scarcely have escaped the attention of the legislature, that a set-off in the district court might, as in the Court of Requests, often exceed the jurisdiction, which at that time was more limited than it is at present; and from the same precaution not being used to prevent the district court from entertaining a set-off exceeding the amount for which a suit might be brought. I think it but reasonable to infer, that it was intended to enable a defendant to recover any balance due him, on giving an ordinary notice, or pleading a set-off, whatever that balance might be.

It might very well have been imagined, that cases of that kind would be of very rare occurrence, and therefore that no injury was likely to arise from leaving it in the power of a jury to give a verdict, and for the court to give judgment, for the idefendant, for any sum proved to be due him.

Now there is an appeal from the district court: and as the statute to which I have referred is remedial in its object, and intended to diminish litigation, I think it should receive the most liberal and extended construction that can be given to it. The decision in this case, to allow the defendant to recover only a part of the set-off proved beyond the plaintiff's demand, seems to me to be clearly wrong. The defendant might have proved any items of his account to set off against plaintiff's demand; but if unable to prove specific items, but able to prove an account stated for a much larger sum, my opinion is, that he should have had a verdict rendered in his favour for the difference; or that a general verdict should have been given for him, allowing the set-off merely to the amount of plaintiff's demand, and leaving the difference to be recovered in an action against the plaintiff.

JONES, J., and DRAPER, J., concurred in opinion with the Chief Justice.

MACAULAY, J., in the Practice Court,

Per Cur.—Appeal dismissed with costs.

SEARSON V. SMALL, ONE, &C.,

It is no part of an attorney's duty, under the ordinary retainer, to issue an execution and collect the money upon his judgment. His authority ceases with the judgment. Where, therefore, in an action against an attorney, the plaintiff states the promise to be, that defendant would prosecute and conduct a certain action in a skiiful and diligent manner, and then lays as a breach of defendants undertaking to prosecute the action, &c—that he delayed to issue execution—without averring any special retainer to do so—Held, per Cur., declaration bad on general demurrer.

Declaration on the following special count, and on the common counts. And whereas also heretofore, to wit, &c., in consideration that the plaintiff at the request of defendant would retain and employ the defendant as such attorney as aforesaid, to prosecute and conduct a certain other action in the said District Court of the Home District, by and at the suit of the plaintiff against one John B. Townsend, for the recovery of a large sum of money, which the plaintiff then claimed to be due and owing to him from the said John B. Townsend, for certain reasonable fees and rewards, to be therefore paid by the plaintiff to the defendant, he, the defendant, then promised the plaintiff to prosecute and conduct the said action in a proper, skilful and diligent manner; and although the plaintiff, confiding in the said promise of the defendant, did, to wit, on the day and year last aforesaid, retain and employ the defendant as such attorney as aforesaid, for the purpose and on the terms aforesaid; and the defendant then and there accepted such retainer and employment, and under and by virtue thereof afterwards, to wit, on the day and year last aforesaid, as the attorney of and for the plaintiff, commenced an action for the recovery of the said sum of money against the said John B. Townsend, in the said District Court of the Home District, and in the said District Court of the Home District, to wit, on the 3rd day of June in the year aforesaid, recovered final judgment therein, against the said John B. Townsend, for and in favour of the plaintiff; and although the defendant could and might, in case he had prosecuted the said action with due care and diligence and despatch, have then and there obtained and issued execution against the goods and chattels of the said John B. Townsend, upon the said judgment so obtained as aforesaid, and then and thereby have recovered the said sum of money for the plaintiff heretofore, to wit, on the first day of August in the year aforesaid: yet the defendant, well knowing the premises, but not regarding his duty as such attorney, nor his said promise, did not nor would, although often requested so to do, prosecute the said action with due care and diligence and despatch, but, on the contrary thereof, he, the defendant, so carelessly, negligently and improperly conducted himself in and about the prosecution of the said action, delayed, refrained and refused to obtain and issue execution against the goods and chattels of the said John B. Townsend as aforesaid, and hath, since the said 3rd day of June aforesaid, hitherto wholly delayed, refrained and refused, although often requested so to do, to obtain and issue such execution as aforesaid, whereby the plaintiff hath been greatly delayed, prejudiced and injured, and hath lost and been deprived of the use and advantage

of the said sum of money, and of the means and opportunity of recovering the same.

General demurrer to the special count, and the common counts. That the causes of action in those counts respectively complained of are set forth by way of recital, and in an argumentative and uncertain manner, instead of by a positive and distinct averment—and for that the said third count shews no good cause of action against the defendant.

H. Eccles for the demurrer, relied upon Brock v. McLean, Taylor's Reports, 4 Bing. 573; 16 L. J. Exch. page 46; 2 Cr. & J. 418.

G. A. Phillpots contra, cited 2 Chitty Pl. 33; 5 A. & E. 222; 6 N.
 M. 620; 4 B. & Ad. 433; 9 Bing. 604.

ROBINSON, C. J., delivered the judgment of the court.

In 2 Inst. 378, the attorney for plaintiff may sue out execution against the defendant within a year of the judgment, though by the judgment the warrant of attorney is determined, which seems rather contradictory. We know that the practice constantly is, for the plaintiff's attorney not merely to carry on the suit to judgment, but to enforce the judgment by execution; and this he considers part of his duty, without any new or special authority or instruction.

But if at common law, or upon the footing of general usage in the profession, the plaintiff can claim of right, that the defendant was bound to issue execution, and do all that could be done for collecting the money, then he should have charged, that he had promised and undertaken to do so, and relied on proving the obligation to be to that extent. But in this third count he has laid the promise to be, that defendant would prosecute and conduct a certain action in a skilful and diligent manner; he then avers, that he did not recover final judgment, and lays, as a breach of defendant's undertaking to prosecute the action, that he delayed to issue execution, and he does not lay any special request to do so, nor retainer to do so, nor does he shew that the debtor had any goods from which the money could have been made.

If the plaintiff had relied upon the fact, that it was the defendant's duty under his retainer to issue execution and collect the debt, then the question would be, whether that duty did result from the retainer; but he treats the duty of issuing execution as resulting from the promise to prosecute the action, which I take to be inconsistent with the legal principle, that the attorney's authority ceases with the judgment, and that the action is at an end when the plaintiff has judgment.

In Russell v. Palmer, 2 Wilson, 325, an action was brought against an attorney for not charging a defendant in execution in due time, whereby he was superseded; but there it is laid in the declaration, that the attorney was employed by plaintiff as his agent and attorney, from the commencement of the action to the discharge of the debtor out of custody.

We think defendant is entitled to judgment on demurrer to the third count; but that neither that count nor the common counts following are bad for the reasons specially assigned.

Per Cur.—Judgment for defendant on demurrer to third count, for plantiff on the subsequent counts.

FERGUSSON V. KERR.

Where A., as part consideration for the purchase of certain timber from B., promises C. to pay B.'s debt to him of 20l., and pays 10l. to C., and is to pay the remaining 10l. the next morning—Held, per Cur.—reversing the judgment in the court below—that in an action of assumpsit, brought by C. against A., C could recover 10l. on the account stated.

Appeal from the District Court of Bathurst District.

Assumpsit on the common counts, for work, labour and materials, goods sold, money lent, paid, and on account stated.

Plea, general issue.

It was proved on the trial in the district court, that the defendant, as a part consideration for the purchase of one McNab's raft, promised to pay to the plaintiff the sum of 20l., the amount of a debt due by McNab to the plaintiff. The defendant paid upon this promise the sum of 10l., and was to pay the other 10l. on the following morning. The judge, under these facts, ruled, that there was no evidence to go to a jury to prove the account stated; that if the defendant could be held liable to the plaintiff at all, it could only be on the count for money had and received, which was not in the declaration.

From this decision the plaintiff appealed, contending that where the defendant, in order to obtain the timber, promised to pay this debt of 201., as part of the price of the timber, to the plaintiff, he became indebted to the plaintiff, and could be sued on the account stated.

G. A. Phillpotts for the appeal, cited 2 P. & D. 276; 3 U. C. R. 323;
15 L. J. C. P. 245; 12 L. J. Exch. 15; C. M. & R. 387; 1 A. & E. 488;
3 M. & P. 186.

A. Wilson contra, contended that it was not shewn that the defendant had received the money upon the sale of the timber, when he premised to pay, and that therefore there could be no account stated, as if a debt were due.—4 Tyr. 673; 2 Dowl. 546; 10 E. R. 106; Bull. N. P. 129; 1 T. R. 40; 4 B. & C. 163.

ROBINSON, C. J., delivered the judgment of the court.

I think the action was sustained by the evidence on the account stated.

Kerr had sold the raft, having assumed to pay plaintiff's claim on McNab as part of the consideration on which he got the timber; and the money lying for him in the hands of his agent, the merchant in Quebec who sold it, he paid 10*l*, on account of the 20*l*, and promised to pay the other 10*l*, the next day. It was a debt of his, not of McNab's, and the evidence shewed an account stated and promise to pay more specific than was necessary.

The Statute of Frauds has no application under such circumstances, because it was not then the debt of another, but his own; it was money which he held by McNab's appointment to be paid to plaintiff, and he had promised plaintiff to pay it, admitting the sum, which made good evidence of an account stated. He admitted in the evening that he stood indebted to plaintiff 101., which he would pay next morning; he owed him that amount because he had in fact paid McNab so much less for the timber on engaging to discharge the debt, and there is, we know, a lien in Lower Canada on the timber in favour of the hands.

From the moment that this defendant, in order to get the timber, assumed this debt to be accounted for as part of the price he was to pay for it, he became debtor to the plaintiff, who could look to him, and beyond all doubt when he had expressly promised to pay him.

The case in this court of McDonell v. Cook, 1 Cam. 542, is the same in principle.

We think that the order made on the motion to set aside the verdict should be reversed, and the rule for new trial discharged with costs.

Per Cur.-Order below reversed.

WATSON V. GAS COMPANY.

In action against a gas company for a nuisance—a plea of justification, containing the averments that they are now managing their works carefully, and that the vapours complained of unavoidably arise—is bad—as applying the defence to the time of pleading the plea, and not to the time of action brought.

Semble, that a declaration would be good, charging in general terms the defendant with causing offensive vapours to arise, &c., without assigning the particular cause of the vapours. Were it, however, a good ground of special demurrer—the defect would be cured by the plea undertaking to describe the causes, &c., and to justify them.

Quære.—Can the Gas Company of the City of Toronto, under their act of incorporation, and their lease from the City of Toronto, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights—so long as they occasion no nuisance which they could by due care have avoided?

Declaration. Second count. And whereas also afterwards, and before the committing by the said company of the grievances hereafter next mentioned, the plaintiff was and from thence hitherto hath been and still is possessed of the said lot and distillery with the appurtenances as in the first count mentioned; and the said company being so possessed of the said messuage or gas factory with the appurtenances as in the said count also mentioned, the defendants, contriving and intending to injure the plaintiff, and to incommode him in the enjoyment and use of his said lot and distillery, afterwards, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously caused and procured divers noxi" ous and offensive vapours, fumes, smokes, smells and stenches to arise and ascend near, to, in and about the said distillery and premises of the plaintiff, and thereby, during all the time aforesaid, the said distillery and premises of the plaintiff were rendered and became unhealthy and unwholesome and unfit for the necessary purposes; and by reason of the premises the plaintiff has been and still is prevented from keeping any supply of grain or meal or other materials necessary for the uses and purposes of the said distillery, in or near to the same, and hath been and was, during all the time aforesaid, thereby hindered and prevented from carrying on the business of distilling thereon, and hath been and is, by reason of the premises, otherwise greatly injured and damnified.

Third plea to the second count—after justifying the grievances complained of, by reason of the lease from the City of Toronto to the defendants, for the purpose of erecting gas works to supply the City of Toronto with gas, and a subsequent lease from the City of Toronto of the

adjoining lot to the plaintiff, who well knew of the prior lease of the adjoining lot to the defendants, and of the purposes for which that had been given-proceeded thus :--And the defendants say, that the said manufacture of gas is conducted and carried on by them, the defendants, in a careful and skilful manner, and without any neglect or want of due and proper caution; and that the said vapours, fumes, smokes, smells and stenches unavoidably and necessarily arise from the said manufacture, and not from any want of care, skill or caution on the part of the defendants, and this they, the said defendants, are ready to verify, &c.

Demurrer to third plea. That the plea is bad, on the ground that the act of parliament incorporating the defendants conferred upon them no authority to commit such a nuisance, nor to carry on the business of manufacturing gas in any other manner than private individuals would be and are by law authorised to carry on such business. And also, that the defence set up applied to the time of pleading the plea, and not before

action brought.

An exception was taken to the second count that it was bad, in not having described the cause of the nuisance, but in having charged the defendant in general terms with causing offensive vapours to arise near to and in the plaintiff's distillery.

Sullivan, Q. C., for the demurrer, doubted whether on the main question the plea would not be a defence—but thought it unnecessary to discuss that, as the plea was clearly bad, in only averring that the Gas Company now carry on the work carefully, &c., and not applying the defence to the time during which the injury was done.

Cameron, Sol. Gen., contended, that as the second count did not charge any neglect or want of care in the defendants, the defendants repelling such neglect might be rejected as unnecessary and surplusage. He also contended that the declaration was bad, in charging the defendants generally with causing a nuisance, without assigning the particular cause of the nuisance.

ROBINSON, C. J., delivered the judgment of the court.

The demurrers arise out of a count on which the jury have found for the defendant, and it is therefore only the costs of the pleading that give occasion to determine the points raised.

The objections raised to the third plea are, that the act of the legislature, incorporating the Gas Light Company, gives no right to the company to create a nuisance injurious to any private right of property; but, on the argument, it seemed to be conceded, that so far as the alleged nuisance was inseparable from the object sanctioned by the legislature, the defence presented by the pleas might be sufficient, if well pleaded. But an obvious defect was pointed out in the plea, which is, that it relies on the fact of the defendants having skilfully and carefully managed their works, so as to avoid nuisance, as far as could be done, but it only applies that defence to the time of pleading the plea; they say, that they are now managing their works carefully, and that the vapours complained of unavoidably arise, which is nothing to the purpose, the question being whether the injury committed before action brought was unavoidable, and whether the works were then properly conducted, &c.

The defendants answer, by contending that the second count does not

refer the nuisance to the gas works, and so all that is said about the management of them in the plea is unnecessary; and it is also contended, that the second count is bad in not describing the cause of the nuisance, but charging the defendant in general terms with causing offensive vapours to arise near to and in the plaintiff's distillery.

That would rather be a defect in form than substance, for we could not say that the count does not charge a wrong, but only that it does not charge it with due particularity,

However, it seems to me that the plea itself cures the objection, for the defendants there undertake to assign the cause of the noxious vapours, and to justify them, so they make that definite which otherwise was not so.

And it seems that this general mode of declaring for nuisance is agreeable to precedent.

The fourth plea is subject to the same exception as the third; the defence being only applied to the state of things existing when the plea was pleaded, and not to the time of the injury complained of.

Judgment for plaintiff on both pleas.

With regard to the main question, whether the defendants have or have not a right under the circumstances to carry on their work, provided they occasion no nuisance to the plaintiff which they could by due care avoid, I purposely forbear to give an opinion on it, because the pleas cannot be supported at all events; and since the parties have been near effecting an arrangement, it may be better not unnecessarily to afford to either of them a motive for being unreasonable, by deciding sooner than need be done what must be the event in case of their persevering in the litigation.

EBERTS ET AL. V. LARNED.

A. sues B. in assumpsit, upon the common money count for money paid. B. pleads that he made the promise in the declaration mentioned jointly with one C.—and that C. made a deed in the fee simple of a certain land, which A. accepted in satisfaction of the debt. A. replies by new assigning, that the money sued for is a different sum of money from that mentioned in the plea. B. rejoins, by pleading in abatement the nonjoinder of C. A. treats the rejoinder as a nullity, and signs interlocutory judgment. Held, per Cur.—interlocutory judgment well signed—the plea in abatement being too late, and a nullity.

The plaintiffs, William D. Eberts, John Waddell, and Walter Eberts, bring their action in assumpsit against the defendant.

1st. For 214l., money paid by plaintiffs to defendant's use.

2ndly. For 22l. 12s. 11d. due to the plaintiffs upon an account stated.

The defendant pleaded; 1st. Non-assumpsit to the first count.

2ndly. That he made the promise in the first count mentioned jointly with one James Read, and that Read made a deed in fee simple of certain lands, which the plaintiffs accepted in satisfaction of the debt.

3rdly. Payment of the 214l.

4thly. Non-assumpsit to the second count.

The plaintiff replied to the second plea, that the 2141. sued for was

a different sum of money from that mentioned in the plea, i. e., new assigned, and took issue on the other pleas.

The declaration in the cause had been served on the 2nd of August, 1847, the pleas on the 24th September, and the replication on the 28th of September. And on the 1st October the defendant joined issue on the replications to the third plea, and filed and delivered a plea in abatement to the new assignment, with the usual affidavit verifying it.

On the 6th of October the plaintiff signed interlocutory judgment as regarded the cause of action newly assigned, and on the 6th of October served notice of trial and of assessment, the assizes commencing on the 7th of October.

On the 9th of October the cause was called on, and verdict entered for the plaintiffs for 2941. 18s. 9d., no defence being offered.

The judges being on the circuit, there was no judge sitting in chambers on the 7th or 8th of October.

The defendant's attorney, on the 8th of October, served on the plaintiff's attorney a notice that he would move to set aside any proceeding which he might take at the assizes in pursuance of his notice of trial and assessment, specifying several grounds of irregularity.

The plea which the plaintiff's refused to receive as pleaded to the new assignment, was a plea in abatement for the nonjoinder of Read as a defendant.

The entry of interlocutory judgment in the Crown Office was as follows:

(Date of the declaration.)

Style of the cause: Wm. Duncan Eberts, &c., plaintiff's, by L. S., their attorney, complain of Henry Sherwood Larned, for that whereas, &c.

In the Queen's Bench, Trinity Term, 11 Victoria, 6th October, 1847.

Style of the cause. Interlocutory judgment is signed in this cause for want of a rejoinder to the plea of the plaintiffs, by them pleaded by way of reply to the second plea of the defendant.

Judgment signed this 6th day of October, 1847.

(Signed) C. C. SMALL.

The notice of trial served on the sixth was thus:—"Take notice of trial and assessment of damages in this cause for the next assizes to be holden at the court house in the City of Toronto, on Monday, 7th of October."

The plaintiffs' attorney made oath, that he was assured by the defendant's attorney that if he would allow him to plead, which was done, he (the defendant) would plead issuably, and go to trial on any notice.

The defendant's attorney, relying on objections to the plaintiffs' proceedings, made no defence. Affidavits were filed, which threw doubts on the justice of the verdict.

The defendant had obtained a rule nisi to set aside interlocutory judgment and all proceedings thereon for irregularity with costs, because,

- 1. The judgment was improperly signed, there being a proper and sufficient rejoinder filed and served, as well as a plea to the new assignment.
 - 2. The judgment did not set out the pleadings on record.
 - 3. Did not shew to what the judgment related.
 - 4. Was signed too soon.
 - 5. Was not signed by the plaintiffs' attorney.

6. Was signed to the whole cause of action, there being a proper issue joined to part at the time of signing the same.

7. If signed at all, should have been signed as for want of a plea. Or to set aside the verdict and have a new trial on the merits, and that the defendant have leave to plead to the new assignment.

G. A. Phillpotts in support of the rule.

R. P. Crooks shewed cause.

Draper, J., delivered the judgment of the court.

The case of Rogers v. Custance, 1 Q. B. 77, I think fully establishes that the plaintiff was called upon to new assign in this case. The first count was general, for money paid; the plea admitted a demand for money paid, but shewed such demand satisfied, by a conveyance of lands made by defendant and Read, and accepted by plaintiffs, treating this count as for that particular sum, and no other. But the plaintiffs assert, that they bring this action for a different sum than that which the defendant pleads was not satisfied.—Jubb v. Ellis, 3 D. & L. 364; 9 Jurist, 1057, S. C. By taking issue on this plea, the plaintiff would have admitted that they sued for the very demand met by the plea, and for no other, and they could not under the first count have been permitted to give evidence of any other. And at all events, no exception is taken, if any could be sustained, to the propriety of a new assignment in this case.—Vide Moses v. Levy, 4 Q. B. 213.

Then, is this new assignment properly met by a plea of the nonjoinder of Read? The defendant's second plea plainly shews his knowledge, that the plaintiffs' declaration embraced a demand for which Read was jointly liable, but, instead of then pleading Read's nonjoinder in abatement, he pleads an accord and satisfaction by himself and Read. I think the language of Lord Mansfield in Rice v. Shute, Burr. 2611, is clear to shew he thereby waived this defence; his lordship says, "if the defendant "does not take advantage of it at the beginning of the suit, and plead it "in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, "and then set up a plea, not founded in the merits of a cause, but o the "form of proceeding." The general rule is explicit and is adverse to the admission of a defence of nonjoinder at any, except the earliest opportunity in the cause.

In considering the effect of this new assignment, it is material to bear in mind the different kinds of cases in which its introduction is admissible and proper.—See 1 Saund. 300, in notis. In some the plaintiff is by the actual state of facts compelled to admit, that the declaration covers a cause of action which is in terms at least met by the plea, and may or may not, for the reason stated in the plea, be satisfied or discharged, but he nevertheless, waiving any investigation into, and for the purposes of the present suit abandoning that cause of action, claims to recover for another and distinct cause of action.—Brancker v. Molyneux, 1 Scott, N. R. 553; Norman v. Wescombe, 2 M. & W. 360. In other words, having had two distinct and independent causes of action, to one of which the plea is applicable, the plaintiff means to proceed for the other only, and so explains by his new assignment. In others, though the plaintiff has but one cause of action or demand, the declaration being general, is met by a plea which renders it necessary for the plaintiff to

point out with greater precision what that cause or action is; or the plaintiff, asserting a single cause of action, to which a jurisdiction is pleaded, relies on an excess beyond that which the plea will cover, such excess being part and parcel of the same transaction to which? the justification applies. And there the excess is, more correctly speaking, replied rather than new assigned, as is remarked by Patterson, J., in Bone v. Dow, 8 A. & E. 711, "here the case, as it ultimately stands upon the plead-"ings, has been put upon the footing of a new assignment; but it is not like "that. To new assign would be to say, 'You have mistaken the assault "for which I sue, I sue for a different assault; but here the replication is "in effect, that the assault and battery justified are those complained of, "but that they were more violent than the defendant admits them to be."

The replication or new assignment of excess may be accompanied with a traverse of the justification pleaded, or the justification may be admitted; but the excess being part of the very transaction complained of in the declaration, if the general issue is pleaded to the declaration it traverses also the matter newly assigned. Where, besides new assigning, the plaintiff traverses the justification, that issue has to be tried, though the defendant does not deny the excess, but suffers judgment by default on it. And the plaintiff, if the general issue be also pleaded, has to prove a cause of action to which the justification is applicable, or the defendant need not prove his justification, and the plaintiff can recover for the excess only, If he proves such cause of action, and the defendant makes good his justification, the plaintiff has still damages for the excess; and if the defendants have not withdrawn the general issue, they lose the costs of the cause, not even recovering those of the issues found for them. This doctrine, though apparently not always thought satisfactory (See Broadbent v. Shaw, 2 B. & Ad. 940,) is upheld in Langden v. Bourn, 1 B. & C. 278; House v. Thames Commissioners, 6 Moore, 324, and Vickers v. Gallimore, 5 Bing. 196.

The present case is one of a new assignment of a distinct cause of action, and it appears to me, that the plea of non-assumpsit, and payment remaining to the first count, issue being taken on them, it is incumbent on the plaintiff to prove a debt different from that answered by the second plea, and yet falling within the general scope of the first count. There are many authorities bearing on the question which lead to this result. And this necessity remains, notwithstanding the default on the new assignment. For Hall v. Middleton (See 4 A. & E, 107; 8 A. & E 449; 1 A. & E. 210; 15 Ea. 82; 2 M. & R. 184; 2 M. & W. 40,) illustrates the position, that actions of assumpsit with a single general count, such as for money lent, do not fall within the rule which governs in trespass, where only a single act of trespass is complained of, but belong to the class where the count is capable of covering several trespasses. Were it otherwise there could be no new assignment. Here the new assignment points out, that a further cause of action than that covered by the second plea is included in the declaration, and it waives so much as that plea answers, while the general issue still stands as a denial of all causes of action of which the plaintiff could give evidence under the first count. The same observation is applicable to the plea of payment which is general as to all causes of action included in the first count.

If this conclusion be correct, it establishes the previous position, that the plea of nonjoinder to the new assignment came too late, and was a nullity (Sowter v. Dunstan, 1 M. & R. 508), and the plaintiff would be entitled to nominal damages and the costs of this line of pleadings, even if he failed on the general issue and the plea of payment, just as if the second plea had been adjudged bad on demurrer, and those other issues remained.—See Gregory v. Duke of Brunswick, (in Error) 3 Com. Bench Rep. 481.

I fully concur in the opinion verbally expressed by the Chief Justice, as to the regularity of the judgment by default. And when the court see how the Nisi Prius record is made up, and that the defendant had (as admitted in argument) a regular notice tam triandum quam inquirendum, there seems little reason for holding the plaintiff to have done that which he gave the defendant notice he did not mean to do. If the defendant had appeared at the trial, there was nothing to have precluded him from going into the defence he asserts by his affidavits, for it does not appear to me necessary to let him in to plead to the new assignment for this purpose, for he does not now pretend that the claim therein set up by the plaintiffs is included in the settlement set forth in the second plea.—See 1 Dowl. 412, 467; 9 Price, 336; 9 C. & P. 581.

As the verdict is however large, and the defendant's affidavit, as to merits, is very strong, and as there is reason to think that a misapprehension as to the interlocutory judgment may have operated to prevent this defence being set up at the last trial, I have, in deference to the opinion of my brother judges on that particular, made up my mind that a new trial may be granted, the costs to abide the event.

Per Cur .- New trial granted, costs to abide the event.

PRACTICE COURT.

HILARY TERM, 11 VICTORIA.

Before the Hon. Mr. JUSTICE MACAULAY.

STEWART V. DAVIS.

Where a rule nisi for judgment as in case of a nonsuit was enlarged until the first day of the next term, and on the second day of the term the rule was made absolute, no cause being shewn against it—the court, though they held the defendant regular in moving his rule absolute when he did, allowed the plaintiff nevertheless, upon affidavits filed during the term, to have the rule nisi re-opened for argument.

In this case a rule was obtained, calling on defendant to shew cause why the rule granted this term in this cause, for judgment as in case of a non-suit, should not be rescinded, and the plaintiff be heard in answer to the original rule nisi granted last term. In last term (3rd Nov.,

1847,) a rule nisi was granted for judgment of nonsuit pursuant to the statute, and enlarged to the *first day* of *this* term.

It was stated in the affidavit of Mr. Jarvis, that on the 5th of Feb. he conversed with Mr. Jones, defendant's attorney, respecting this rule nisi, saying he would shew cause early in this term; that he could not leave Hamilton till the end of the first week; that Mr. Jones seemed satisfied, and did not intimate an intention to move it absolute the first_day of the term, but understood that he consented to the above time being allowed, and relying thereon, deponent did not attend at Toronto, or prepare affidavits for shewing cause the first day.

That on the 10th of February he was served with the rule absolute for judgment of nonsuit, moved by Mr. Jones the first day of this term; that he requested it to be opened, but was refused; that he could set forth at any moment good and sufficient grounds for discharging the said rule nisi for judgment of nonsuit, if the rule absolute be rescinded, and plaintiff be heard against the rule nisi.

In reply, an affidavit of Mr. Jones was put in, denying any promise, consent or intimation to Mr. Jarvis, that he would delay moving the rule absolute as stated by Mr. Jarvis, or act otherwise than as he did, but, on the contrary, said his object in being in Toronto the first day of term was to move the said rule, and some others returnable that day, and then supposed the practice required them to be moved on that day; that on the second day of term he moved absolute the said rule nisi, which was granted on the rising of the court that day; that the next evening he informed Mr. Jarvis thereof at Hamilton, who did not find fault with him for so doing, but next day, after copy served, asked to re-open it, but declined shewing the affidavit which he meant to use; thought no good cause could be shewn; denied the marriage of plaintiff and defendant, as rumonred; and that defendant had incurred costs, &c.

It was objected, that even then the plaintiff had produced no affiliavit stating that he had good cause to shew, which ought to have been done.

The plaintiff contended that the rule allowed four days in term, although expressed to shew cause on the first day.

MACAULAY, J.—I should have no difficulty in granting this application, if the plaintiff's counsel had accompanied it with affidavits disclosing the cause it was proposed to shew if the rule were opened; but this has not been done.

On referring, however, to the affidavit on which the rule nisi of last term was enlarged to the first day of this term, enough appears to induce the expectation that sufficient cause exists, and may be shewn, if another opportunity is granted.

Strictly, I think, the defendant's proceedings are regular. The rule nisi was only enlarged till the first day of term, and it was not moved absolute till the second day, so that the plaintiff had all the first and second days to shew cause.

It is not, however, the practice in England or here to be very strict in these matters; and Mr. Jarvis may well have entertained the impression, that the door would not have been closed against him so soon. I think, at the same time, that there has been a want of prompt attention, or the case might have been disposed of in the usual way in good time. As it is, I am willing to make the rule absolute on payment of costs, with

leave to the plaintiff to shew cause against the rule nisi for judgment of nonsuit, before the judge in chambers, on the 11th of March, at noon, according to the consent of the defendant's counsel last term that it should be so disposed of; the presiding judge to direct a rule for judgment absolute, or a rule on the peremptory undertaking and payment of costs, to be issued as he shall see fit.

Per Cur.—Rule absolute on the terms mentioned.

BRUNSKILL V. CHUMASERO ET AL.

Where there are two defendants, and one pleads to issue, and the other allows judgment to go by default, and the plaintiff does not proceed to trial pursuant to notice—the application for judgment as in case of a nonsuit cannot be made by both the defendants, but only by the one who has pleaded.

Semble, that even in a joint action of assumpsit, one of several defendants jointly sued

may move for judgment as in case of a nonsuit.

In this case a rule was obtained by Vankoughnet for judgment of nonsuit, the plaintiff not having proceeded to trial pursuant to notice.

The notice of trial was addressed to the attorney of the defendant, Keating, and to the other defendant personally.

On the motion to discharge the rule with costs, or on payment of costs, it was objected, 1st. That on the 28th of September, 1847, interlocutory judgment was signed against Chumasero, and still remained; that it was an action of special assumpsit on a contract for delivery of flour, made by defendants jointly with one Mason, deceased; that Keating had pleaded that plaintiff replied—that replication to second plea concluded to the country, but that no similiter thereto had been filed or served.

There was an affidavit by MacLean, that notice of trial and assessment were served about the 29th of September last, and the record entered, but that plaintiff did not proceed to trial. It was notice of trial and assessment in the usual form.

This was the affidavit on which the rule nisi was moved. In answer to this, there was an affidavit of plaintiff excusing his not going to trial on account of the illness of Coulter, a necessary and material witness, &c.

It was objected by Hec or: 1st. That issue was not shewn to have been joined .- 1 Ch. Ar. 1073,

2ndly. That there was no denial of countermand.

3rdly. That rule was taken out as on behalf of both defendants, although the application was only on behalf of one; that one defendant could not move a nonsuit.—Spafford v. Buchanan; 6 Will. IV., (Mich. Term.); Commercial Bank v. Hughes, 3 U. C. R. 361; 1 Burr. 358; 3 T R. 662; Tidd, 823; 14E. 239; 5 B. & C. 178; 7 D. & R. 618.

MACAULAY, J.—The first question is, whether the plaintiff can be nonsuited under the circumstances of this case; for that issue is joined seems established by the passing and entry of the nisi prius record.

The cases 11 Jur. 1012; 4 M. & G. 909; 13 M. & W. 811; 4 M. & W. 649; 5 B. & C. 768; 1 Dow. N. S. 449; 1 D. & L. 912; (a) seem

⁽a) Leach v. Dulmage, E. T. 3 Vic. as to which see 2 Marsh, 364; Litt. 1396; 2 Jurist, (1838) 820; do. (1842) page 463; 3 P. & D. 143; 1 N. S 769.

to me to establish, that the application is correctly made on behalf of the defendant only who has pleaded to issue, for, as to the other, he has no right to nonsuit the plaintiff, having suffered judgment by default.

The rule being more general than the motion, in being as for judgment for both defendants, is the inadvertence of the officer, and may be corrected in the rule absolute.

It appears clearly established, that even in a joint action of assumpsit one of several defendants jointly sued may move for judgment as in case of a nonsuit. The case of Stuart v. Rogers et al., 4 M. & W. 649, is precisely in point.

The case of Hadrick v. Heslop et al., 11 Jur. 1012, was a case of tort, but in other respects it is also in point; as is likewise Jones v. Gibson et al., 5 B. & C. 768. The plaintiff can only be relieved, therefore, as to Keating, by entering into the peremptory undertaking and payment of costs, and on those terms the rule may be discharged.

Per Cur.-Rule discharged.

IN THE MATTER OF BECKETT V. COTTON AND ROWE.

In an application for an attachment for the nonpayment of money ordered to be paid by an award, the submission being by bond—the rule nisi was entitled "In the matter of A. v. B."—the affidavit of service was entitled in the same way. The rule making the submission by bond a rule of this court was entitled "in this court. A. v. B." The affidavit of the execution of the award was entitled "in this court" only. The affidavit of demand was entitled "in this court" only. Hell, per Cur., that the entitling of the rule nisi and the affidavit of the service thereof was correct. And also, that there was no material variance between the entitling of the rule nisi and the other previous papers.

This was a rule calling on Cotton and Rowe to shew cause on the last day of term (19th February, 1848,) why an attachment should not issue against them for nonpayment of 2031. 17s. 8d., portion of the money in and by the said award ordered to be paid. The rule was personally served on the 15th of February, 1848, and the affidavit was entitled "in the matter of John Beckett v. James Cotton and James Rowe."

In answer to this rule it was urged:

1st. That an attachment could not be issued on the last day of term.—Loft. 301; 1 Burr. 651; 3 Smith, 118; 5 Burr. 2686, 2502.

2ndly. That being a submission by bond, the defendants had all this term to move against it. No authority was cited in support of this objection.

3rdly. That the rule of court should not be entitled as it was.

4thly. That the other papers were not entitled, and so not uniform.

5thly. That the affidavit of demand was not entitled, and so a variance.

6thly. No proof that the affidavit of execution of the award was served on Cotton.—2 M. & P. 452; 3 Dow. 703; 5 Dowl. 401; 2 Dow. 505; 8 Dowl. 651.

The rule making the submission by bond a rule of this court was entitled in this court, "John Beckett v. James Cotton and James Rowe." Upon reading the affidavit, bond and submission, &c., it was ordered, &c. The

bond was executed by Cotton and Rowe as obligors, to Beckett as obligee.

The affidavit of the execution of the award was entitled in this court only. The affidavit of demand was entitled in this court only. nisi was entitled "in the matter of John Beckett v. James Cotton and James Rowe." And the affidavit of service thereof was entitled in the same way.

The question was, whether there was a fatal variance in the entitling of the affidavits, or other exhibits.—See 6 Dowl. 305; 5 East. 21; 3 T. R. 601; 12 E. 166; 8 Dowl. 651.

MACAULAY, J.—The cases cited seem to me to shew, that the rule nisi and affidavit of service thereof are correctly entitled as they are, and that the previous affidavits, &c., which are not entitled in the names of the parties, are not irregular.

The case is then reduced to the two points—of the title—to the rule making the rule of nisi prius a rule of this court—and the variance in that respect from the other papers.

I do not find that the rule is wrongly entitled—the words plaintiff and defendant are not added to the names of the parties as if a suit were pending; and it is strictly true, that the rule is to make a submission a rule of court between Beckett v. Cotton and Rowe. The bond is given by Cotton and Rowe, and the award is against them. The proceeding in this court, therefore, is by Beckett against Cotton and Rowe, but there being no cause in court, no such entitling was necessary. But I cannot find that it is irregular, or more than surplusage. Nor can I find that the affidavit of demand should therefore be similarly entitled. The practice seems to require, that when a cause is pending, the proceedings should be entitled in the names of the parties, but not otherwise. Herein seems to be the distinction.

Per Cur.—Rule absolute.

DOE DEM, VANCOTT ET AL. V. ROE.

The fact of the tenancy, in an action of ejectment, cannot be contested by affidavits, on a motion to set aside the service of the declaration and notice. Semble, that all that the tenant can do, is to ask the court to excuse him from confessing possession, and to require the plaintiff to prove it.

This was a rule of the Practice Court obtained by Wilson, calling on the lessor of the plaintiff to shew cause, why the service of the copy of the declaration and notice upon Daniel Smith should not be set aside with costs-because he was not, at the time of such service, nor is he, tenant of the premises, or of any part thereof, nor does he make any claim thereto.

An affidavit of Smith was put in, stating that on 5th of February, 1848, he was served with the annexed declaration, for the west half of Lot No. 28, second concession of the township of Thurlow, and denying possession, The notice was addressed to four persons as tenants in possession, including Smith.

Cause was shewn by D. B. Read in chambers, who contended:

1st. That as Smith had not appeared, and made himself a party to

the action, he could not be heard to make this application; and that it is not competent to him being served as tenant in possession, to dispute it, and call upon the court to try the fact by affidavits, but that he should suffer judgment to go against Roe, not being obliged to appear unless he pleased.

2ndly. That on the merits of the application, Smith's affidavit was repelled by counter-affidavits, and therefore the rule should be discharged.

MACAULAY, J.—I find no authority for this application, although a judgment by default against Roe would be evidence against the tenant in an action for mesne profits.—2 Burr. 688. Formerlygthe plaintiff was obliged to prove the tenant in possession, now it is dispensed with. Still I do not find that, either before or since the new rules, the fact of the tenancy has been contested by affidavits on motion. I apprehend all that should be done in any particular instance, would be to excuse the alleged tenant from confessing possession, and requiring the plaintiff to prove it, as was done in Doe ex dem. Canada Company v. Roe, Trinity Term, 1 & 2 Will. IV.—See also 1 Dowl. R. 314; 2 Burr. 665; 4 Dowl. 437.

The affidavit in reply sufficiently rebuts that filed by Smith, and shews that the lessor of the plaintiff was entitled to regard and treat him as a tenant in possession. He need not defend unless he pleases, but the plaintiff's proceedings appearing regular, this rule (being moved with costs) must be discharged with costs. It being explained afterwards, that the affidavits were admitted by consent, after the time allowed by the lessor of plaintiff to file the same: it is under these circumstances discharged silent as to costs—that is, without costs.

Per Cur,-Rule discharged without costs.

RUTHVEN V. RUTHVEN.

Where a cause was referred by a rule of reference at nisi prius—and the rule of reference and an enlargement of the time for making the award (which enlargement did not appear upon the face of it to have been assented to by both parties) were made rules of court; the court—upon an application for an attachment for the non-performance of the award, refused the attachment, upon the ground that the enlargement of the time was not shewn to have received the mutual consent of both parties.

In this case *Eccles* moved for an attachment against the defendant, for not performing an award.

The cause was referred by rule of nisi prius at the last Niagara District assizes, i. e., all matters in difference in the cause, to James Harvey and William Woodruff, or, if they disagreed, to the umpirage of Geo. W. F. Downs. The award or umpirage to be made in writing, on or before the 1st November, 1847. Costs of the cause and reference to abide the event.

This rule of reference was, in Hilary Term, made a rule of court; and it was also ordered, that the *enlargement* of the time for making the award in the following words—"upon the application of James Boulton, "Esq., attorney for the defendant in the within cause, the time for "making the award in the within cause, is enlarged until the 23rd of

"November instant." Signed, J. Harvey and William Woodruff, arbitrators. Dated 1st Nov. 1847—be made a rule of this court.

On the 23rd November, 1847, an award was made by the two arbitrators, that defendant was indebted to plaintiff in 668l. 4s. 1d., and that the defendant should pay to the plaintiff the said sum with interest as follows: one half and interest in two months, and the other half and interest in five months.

The costs of reference were assessed at 131. The award was proved by affidavit.

On the 12th of February, 1847, an allocatur of costs taxed was given, including the 13t., at 26t. 11s.

On the 14th February, 1848, a power of attorney was given by the plaintiff to Stevenson.

An affidavit of Stevenson's was filed, shewing demand of $334l.\ 2s.\ 0\frac{1}{2}d.$, being the half of the sum awarded; also of $3l.\ 6s.\ 9d.$, the interest thereon; also of $26l.\ 11s.$ for costs, and stating that the defendant did not pay any part thereof.

J. Boulton, of Niagara, for the defendant, shewed cause at once, and objected, that the endorsement of the enlargement was not alleged or shewn to be by mutual consent, and denied its being made on the day it was dated.

It was admitted by *Eccles*, for the plaintiff, that Mr. Stevenson opposed the enlargement. The award recited, that on the 1st of Nov. the parties appeared by counsel; that *Boulton*, for the defendant, requested the enlargement to the 23rd of November, to which Stevenson assented.

Mr. Boulton referred to the affidavit of Stevenson, on which the enlargement was made a rule of court, as not being explicit, or shewing a mutual consent to the enlargement.

MACAULAY, J.—On this application the rule of reference must be acted upon, if valid on the face of it; but if the enlargement, as therein stated, did not authorize the award, or permit of such enlargement being made a rule of court, it would be a valid objection.—6 Taunt. 251; 8 T. R. 87; 5 E. 189; 1 Smith, 380; 8 E. 13; 15 E. 97; 8 Dow. 131; 9 M. & W. 60.

Halden v. Glasscock, 5 B. & C. 390, where a cause is referred by a judge's order, and the time afterwards enlarged by the judge's order, it should be shewn that such orders were by consent of parties. After the original order by consent, the time was twice enlarged by Abbott, C. J., in the following terms:—"I do order that the time for the arbitrator to make his award in this matter be enlarged until the 21st of June and 1st of July."

In refusing an attachment, Holroyd, J., said, "to bring the party into contempt, at least it must be shewn that the enlargement of the time was by consent."

Dickins v. Jarvis and Smith, 5 B. & C. 528; where the submission empowered the arbitrators to enlarge the time, and such enlargement was made a rule of court, held sufficient—Bayley, J., said, it differs from Halden v. Glasscock—for there the time was enlarged by a judge's order, which did not on the face of it appear to have been made by consent

of the parties, it appeared to be made proprio vigore judicis, and therefore was not binding.

Mason v. Wallis, 10 B. & C. 109; where the arbitrator was empowered to enlarge the time by endorsement to such day as he should appoint in writing, and a judge of the King's Bench should order, the time being enlarged by the arbitrator who made an award, but the enlargement not being ratified by a judge; Held, that he had no authority, and an attachment was refused, although the endorsement was made a part of the rule of court.

Lawrence v. Hodgson, 1 Y. & J. 16, and Hoyle v. Jennings, cited ib.; 8 Dow. 130, (a first enlargement irregular, the second regular, held, a waiver); 1 M. & S. 1; Benwell v. Hinxman, 3 Dow. 501, (judge's order to enlarge by mutual consent); 1 M. & W. 159; 5 M. & W. 27; 7 M. & W. 378; 9 B. & C. 659; 2 D. & L. 967; Tidd. 881.

A consideration of the cases leads me to the conclusion that this rule should be discharged.

The arbitrators had no power, inherent or contained in the submission, to enlarge the time. Of course the parties themselves might do so; and what they could do their attornies acting in their behalf might do, whence it may be inferred, that such attornies (being competent to do it themselves) might authorize the arbitrators to enlarge the time so as to bind their clients. Still I find no case in which arbitrators, not empowered by the submission to enlarge the time, have done so by consent of the parties or their attornies, though there are many instances of the time having been enlarged by the parties in person or by their attornies. It is ingrafting an oral authority on a written submission.

But the present is neither of these cases. The arbitrators, on the last day for making their award, upon the application of James Boulton, Esq., attorney for defendant, enlarged the time in writing for making the award until the 23rd of November, 1847, in the following words: "upon "the application of James Boulton, Esq., attorney for defendant in the "within causes, the time for making the award in the within cause is "enlarged until the 23rd of November instant.

(Signed) J. Harvey and W. Woodruffe, Arbitrators.

Dated 1st Nov., 1847."

It does not on the face of it appear to have been done by mutual consent of both plaintiff and defendant or of their attornies, but on the application of one of them. Now one of them (the defendant for example) could not, in person or by attorney, so enlarge the time without the concurrence of the plaintiff or his attorney, and if not, it follows that his attorney could not impower the arbitrators to do it. Thus on the face of the rule of court, there is the want of an enlargement prima facie binding on both parties.

When ordered to be made a rule of court, I inferred the assent of the plaintiff, especially as the application was made on his behalf by his attorney; but the necessity for a more distinct appearance of mutuality on the face of the enlargement and rule, did not then strike me with the same force that it now does.

Beyond this, it is asserted and admitted as a fact, that the plaintiff's attorney objected to the enlargement, although the arbitrators in their award recite his assent.

Whether he so objected in the desire that the award should be made at once, being the last day of the time limited in the rule of reference, or in order to defeat the reference altogether, is not suggested; but whatever the motive may have been, it seems that the enlargement was made, not only without the consent of the plaintiff, which consent is not on the face of it imported, but that it was against his will.

Under such circumstances, unless it were shewn, that before the award was made the plaintiff notified his acquiescence in the enlargement, and became a party thereto, he cannot adopt it since the award was made, because in his favour, having it in his power at the same time to have set it aside as unauthorized, had it been against him, or not satisfactory to him.

There is nothing in these proceedings to shew that the plaintiff did become a party to the enlargement before the award was made, or that he is not seeking to enforce an award highly beneficial to him, which award he might have set aside as made without his consent or authority, had it been his interest or inclination to have done so.

Under such circumstances, I do not feel authorised in ordering an attachment, and therefore the rule is discharged. Leave, however, is reserved to the plaintiff to renew the application before the full court next term, if so advised.

Per Cur.—Rule discharged.

RUTHVEN V. RUTHVEN.

Where a cause was referred to nisi prius, and the rule of reference was made a rule of court, together with an enlargement of the time for making the award which had been endorsed on the rule of reference—but there being no authority contained in the rule of reference to enlarge the time, and such enlargement not having been assented to in writing by both parties.—Held, per Cur.—upon an application to set aside the rule making the order of reference, and the enlargement of time thereon endorsed, a rule of court—and also the award founded upon the said reference and endorsement—that—1st. the rule, so far as it made the rule of nisi prius a rule of court, could not be set aside. 2ndly. That that part of it making the enlargement of the time endorsed on the said rule a rule of court might be set aside. 3rdly That as in strictness both parties must be taken verbally to have assented to an enlargement of the time to the 23rd of November, when the award was made—the award could not be set aside.

On the 17th Nov., 1848, a rule nisi was granted on motion of J. Boulton of Niagara, calling on the plaintiff to shew cause why the rule of this term, making the order of reference and the enlargement thereon endorsed a rule of this court, should not be set aside, the award having been made after the time limited in said order of reference for making the same, and no sufficient enlargement having been made for the same being extended; and upon other grounds appearing in the affidavits filed, and on the face of the said endorsement on the order of Nisi Prius; and that the enlargement so indorsed did not appear to have been consented to by the plaintiff or his attorney; and that the said indorsement, on the order of nisi prius, was not put there, till long after the day named in the order of nisi prius for making the award had elapsed; or why the award founded

thereon should not be set aside on the grounds above mentioned, with a stay of proceedings, and for production of the nisi prius record.

On the consent rule was endorsed the following enlargement: "upon "the application of James Boulton, Esq., attorney for the defendant in "the within cause, the time for making the award in the within cause is "enlarged until Tuesday the 23rd of November instant. Niagara, 1st "November, 1847.

(Signed) J. Harvey, Arbitrator. (Signed) W. Woodruff, Arbitrator."

But the rule of reference contained no power to the arbitrators to enlarge, or other provisions for enlarging the time for making an award.

Annexed to the rule of reference was an affidavit of Mr. Stevenson, plaintiff's attorney—that the cause was referred as by rule annexed, and that the time for making their award "in the said cause was enlarged "by the arbitrators in the said order named, on application of James "Boulton, Esq., attorney for the defendant therein, until the 23rd of "November last; and that on the said order of reference, under the hands "of the said arbitrators, enlargement of time in this behalf is endorsed, "as upon the said order will appear, on which said 23rd of November the "said arbitrators made their award."

Affidavit of James Boulton, that before the 1st of November, the arbitrators heard some of the evidence, but that the defendant could not possibly procure his witness from Hamilton; and that they, the said arbitrators, consented to enlarge the time until the Saturday following, 1st of November, but that the plaintiff was not present on the said 1st of November, or any time thereafter, before the said arbitrators, and did not consent to such enlargement until the said Saturday, being the 6th Nov., following the time limited in the said order of reference. And the plaintiff's atorney strongly objected to their so enlarging the time; that the arbitrators met on the said Saturday, when the defendant applied to them and the plaintiff's attorney, Mr. Stevenson, to enlarge the time; that the said arbitrators did say they would hear evidence at any time between that and the 23rd of November, but declined entering the same in writing for the deponent, except that Woodruff wrote a note to Harvey consenting to such enlargement until the 23rd of November; but that Stevenson, plaintiff's attorney, objected to such enlargement, and to the power of the arbitrators to enlarge the time; and that his client, the plaintiff, also objected to any enlargement. That on the 23rd of November, deponent again applied to the arbitrators for more time, but they declined, and Harvey then told him that the award was made. That on the said 23rd of November, and after the arbitrators had refused a further enlargement, Stevenson, plaintiff's attorney, came to deponent to endorse or sign an endorsement which he had written on the nisi prius record consenting to the said enlargement, but that he objected to do any thing in the matter, as Stevenson had always objected to such enlargement; that the enlargement on the rule of reference was not put there till long after its date, nor did defendant know of it till he saw it here in court; and that he believed that it was written on the said 3rd of November; also, that he did not, on or before the 1st of November, apply for the enlargement, as endorsed on the rule of nisi prius, but for a week's time.

On the nisi prius record was endorsed, in Mr. Stevenson's writing, an unsigned enlargement, dated 30th October, 1847, to 25th of November, as at the instance of Mr. Boulton, defendant's attorney.

Cause was shewn by Eccles for plaintiff, who filed an affidavit of Mr. Stevenson's; that the arbitrators held one sitting during the last sessions, when defendant produced all the witnesses he had at the assizes, who were examined. That Mr. Boulton, defendant's attorney, said he had further evidence to produce, and it was then agreed, that Mr. Boulton should notify the arbitrators and deponent of the time he would produce such additional evidence, but no notice was received from thence until the 1st of November. That on said 1st of November, deponent and Mr. Boulton being present, he applied to the arbitrators to enlarge the time; that deponent objected to the arbitrators extending the time as requested, but said arbitrators did not then decide to refuse such And it was afterwards enlargement, and did not deliver an award. agreed at the instance of the said James Boulton, and ordered by the arbitrators, that the time for hearing testimony in this matter should be enlarged till the 23rd of November last, the said James Boulton to notify deponent what witnesses he intended to produce, &c., but none was given; and on the 23rd of November deponent proceeded to Niagara on the subject; that Mr. Boulton appeared and solicited a further enlargement, which the arbitrators refused, and made their award; that his request to Mr. Boulton to sign the consent to enlarge, endorsed on the nisi prius record, was made before and not after the arbitrators had refused to enlarge the time again; and that such consent was to an enlargement granted to said James Boulton for defendant, and which he had requested; and that the enlargement endorsed on the order of reference, although so endorsed and subject to said James Boulton's refusing to sign such consent, was an enlargement to a time asked for by the said James Boulton, and ordered by the arbitrators as above stated.

On the 4th of November, Mr. Boulton, at Niagara, requested Mr. Stevenson, at St. Catharnes, by telegraph, to consent to enlarge the time, to which he answered that he would be in Niagara on the Saturday.

Eccles contended: 1st. That no ground was shewn for setting aside the rul of court; and that the award being wrong was no ground for setting aside the rule of court, although made out of time. Burley v. Stephens, 1 M. & W. 156, was a case in which a parol enlargement was deemed sufficient, neither party objecting.—7 Price, 639. That defendant could not object, having requested the enlargement.—5 B. & C. 390; 8 Taunt. 694; 1 Y. & J. 16; Hallett v. Hallett, 5 M. & W. 25.

Boulton, in reply, contended that there were two enlargements, from the 1st to the 7th, and from the 7th to the 23rd of November, and one only endorsed (as from the 1st to the 23rd of November), and that being verbal, that they would not be made rules of court; also, that the enlargement endorsed, not having been explained to be antedated, should be set aside in toto.

MACAULAY, J.—There is no reason shewn for setting aside the rule, so far as it makes the rule of nisi prius a rule of this court; but that part of it which makes the enlargement endorsed a rule of court should, 1 think, be set aside, because, in the first place, such enlargement was

not endorsed at the time it imports to have been signed; and the court was not informed of the fact, that it was only written on the 23rd of November. Also, because no enlargement ever was made with the concurrent assent of both parties, or their attornies. At first the defendant's attorney requested it, but the plaintiff's attorney objected, and seemingly yielded to the authority assumed by the arbitrators, when they determined to exercise it. On the 23rd of November, Mr. Boulton objected to do anything in the matter, because a further enlargement was declined, so far, that before an award was made, and before the enlargement was ordered, he refused to sign a consent to the enlargement endorsed on the nisi prius record.

I think the rule sufficiently points out the objection, and even as endorsed it does not shew an enlargement by mutual consent, and without it the arbitrators had no such power.

I am not prepared to set aside the award. According to the facts two enlargements were made verbally, at the request of the defendant's attorney, and though opposed by the plaintiff's attorney, not so opposed in order to avoid the reference, but to expedite the making an award.

To such enlargements the defendant should not object; and on the 23rd of November, before the award was made, the plaintiff's attorney was present, and assenting thereto. The defendant's attorney does not appear to have withdrawn his consent, if he could have done so after receiving the benefit of the full period of the enlargement, but declined signing, on the 23rd of November, a written consent to such enlargement as on the 30th of October.

It appears to me, therefore, that in strictness both parties were, on the 23rd of November, through their attornies, verbally assenting to the enlargement of the time to and upon that day, and when the award was made.—Leggett v. Finlay, 6 Bing, 257; Perbury v. Newham, 7 M. & W. 382; 3 Dowl. P. C. 501; Billings on Awards, 9, 10, 11, 12, 78-9; 17 Ves. 419.

Per Cur.—Rule made absolute as to the enlargement of the rule of reference, but discharged as to the rule of reference itself and the award.

RUTHVEN V. RUTHVEN.

Where a defendant was arrested, and in close study on mesne process, and pendente lite the cause was referred by a parol submission to arbitration, followed by an award in the plaintiff's favour, for a sum payable by instalments, one of which was due at the time an application was made to discharge the prisoner from close custody in consequence of the award; Held, per Cur., that the prisoner, under these circumstances—without shewing payment of the instalment due—was entitled to his discharge.

On the 20th of March, 1848, before Macaulay, J., in chambers, Boulton obtained a summons calling on plaintiff to shew cause why defendant should not be discharged from the custody of the Niagara sheriff, upon the writ of capias ad respondendum issued in this cause, enlarged till the 24th of March, 1848, when Eccles shewed cause.

The cause was stried at the Niagara Spring Assizes in 1847, when a verdict was rendered for the plaintiff, but afterwards set aside on defendant's application on the merits.

The cause was entered for trial at the last (Autumn) Assizes for the said district, when, without verdict, it was by rule of nisi prius referred thus:—Ordered that all matters in difference in this cause be referred to the award final end of James Harvey and William Woodruff, and, in the event of their disagreement, to George W. S. Downs, to order and determine what they or he shall think fit to be done by the said parties respecting the matters in dispute, so as award be made before the 1st*of November, 1847. Costs of the cause and reference to abide the event of such award.

Nothing said of staying proceedings, or of enlarging the time.

On the first of November the time was enlarged, at the request of defendant's attorney, for a week; afterwards, at the same request, till the 23rd of November last, on which day an award was made by the arbitrators, reciting the rule of reference as the submission of the court, &c.; that defendant is indebted to the said plaintiff in the sum of 668l. 4s. 2d.; that defendant do pay to plaintiff the said sum with interest in two instalments, as follows: one half of the said sum and interest in two months, and the other half of said sum and interest in five months from date hereof.

The submission and enlargement were made rules of this court; and in the course of last term the plaintiff afterwards applied for an attachment against defendant for nonpayment of the first half of the sum awarded, 334l. 4s. $1\frac{1}{2}d$., and 3l. 6s. 9d. interest, and 26l. 11s. costs taxed, including 13l. costs of reference, on affidavit of the demand, and refusal as usual.

This was opposed and the attachment refused, on the ground that the rule of court did not shew that the enlargement, which was made by the arbitrators on the 1st of November, 1857, without any authority contained in the rule of reference, was done without the assent of plaintiff.—See preceding case.

During the same term defendant's counsel moved to set aside the rule of court and award, upon which so much of the rule as made the enlargement a rule of court was set aside (see preceding case), but not the award or the rule of reference itself. So that the rule of reference remained a rule of this court, and the award stood, however, impeachable on grounds not taken against it, if within the jurisdiction of the court, which it is not at present.—See Billings, 128; Pearson v. Archbold, 11 M. & W. 477.

Now the defendant moved to be discharged from the arrest in the cause, having been in close custody since the commencement of the suit.

The cases referred to shew the foregoing proceedings, and that at present there is a rule of reference, with an award made after the time therein limited, binding on the parties; they have both assented to the enlargement in fact, but such enlargement not being a rule of this court, whether it can be so made a rule by application in chambers, or to the court in term, not being decided.

The first instalment then due had not been paid, the second would not be due until the 28th of April next.

The summons was opposed by *Eccles*, on the grounds that defendant could not now plead the award "puis darrein continuance," i.e., without

shewing performance and payment of what is due, and therefore was not entitled to be discharged, as plaintiff might still go on and obtain a verdict for the amount of the debt, which defendant could not resist, the rule of reference containing no stay of proceedings of the cause, and the award being silent on the subject of the suit.—Allan v. Milne, 2 Tyr. 113; 2 C. & J. 47.

Boulton contended, that he was in effect supersedable and entitled to be discharged, though the first instalment was not paid—the suit being virtually ended by the award and costs taxed thereon, &c.—upon the maxim, that once supersedable always so, unless the state of the proceedings or the nature of the custody, &c., be changed—and here the defendant was supersedable when the award was made, time being thereby given, and before the day for payment of first instalment, if not, after default since made.

MACAULAY, J.—As it now stands before me, it is in effect the case of a parol submission by the parties of the cause to arbitration, such submission not being a rule of court, with an award in plaintiff's favour, the amount of which is partly due or unpaid, and partly not yet payable. And the question is, whether a parol submission of a cause pendente lite, followed by an award in plaintiff's favour, for a sum payable in instalments, one of which is due at the time of the application, entitles the defendant to be discharged from custody in such suit.

Had the cause been tried last assizes, the plaintiff could have claimed judgment in November last, before the time when the award was made, but he cannot now try the cause till next month, or obtain judgment till June next.

An agreement to refer the cause by rule of nisi prius is endorsed on the nisi prius record, entered at the last assizes, dated 20th September, 1847, and signed by the attornies of plaintiff and of defendant, but it says nothing, nor does the rule of reference, of the proceedings in the action being stayed at defendant's request, or being stayed at all.

This consent only extended the time to the 31st of October, before which plaintiff could not have obtained judgment had he gone on to trial. The time was afterwards extended by parol, or verbally by the parties, to the 23rd of November, but though the plaintiff assented to an award being made that day, he had previously uniformly opposed an extension of the time.

Bowsfield v. Tower, 4 Taunt. 456; if plaintiff accepts a cognovit extending the time for payment beyond the period when judgment might have been recovered in the ordinary course, the bail are discharged.

Mausfield, C. J.—If the defendant had been surrendered after such a cognovit, the court would discharge him. The purpose of all their proceedings is, to secure the plaintiff, but the plaintiff has agreed to take the money in a different way, and therefore the bail are discharged.

Heath, J.—It would be very extraordinary, that, if the plaintiff parted with the power of taking defendant till default made in payment of the instalment, the power of taking him should subsist in the bail—that power is entirely derived from and dependent upon the power of the plaintiff to take him.

Chambers, J.—If the bail were to surrender their principal, they would be discharged in a circuitous way, for no doubt the court would hold the principal entitled to his discharge. Thomas v. Young, et al. S. P. 15 Taunt. 618; Bayley, J., said, that the plaintiff could not give a partial indulgence to the principal without the consent of the bail, and that if he did, it discharged them, for the bail could not after this have surrendered their principal.—Croft v. Johnson, S. P., 5 Taunt. 314.

Melville v. Glendenning et al., 7 Taunt. 126; so if plaintiff accept bills of exchange. Gibbs, C. J.—If the creditor gives time to the principal, he creditor cannot, during that time, take or proceed against him: neither during the same period can the bail, who are therefore discharged.—Farman v. Thorley, 4 B. & A. 91, so of bail to the sheriff.

Rex. v. Sheriff of Surrey, 1 Taunt. 159; so of the sheriff. Heath, J.—Here the party elects a different remedy against the defendant, and thereby absolves the sheriff. This cognovit is a new modification of the debt, and the plaintiff, by acquitting the defendant of the former debt, acquits the sheriff.—Hodgson v. Nugent, 5 T. R. 277; Shakespeare v. Phillips, 8 E. 433; Howard v. Bradbury, 3 Dow. 92, seem to be overruled. Stevenson v. Roche, 6 B. & C. 707; but not discharged unless time be given.—5 Taunt. 614; 7 Taunt. 53; 2 Mar. 383; 1 M. & W. 679; Ladbrook v. Hewitt, 1 Dow. 488; 4 Dow. 256, 660; 1 Bing. 164; 5 Dow. 448; 6 Taunt. 399; 2 Mar. 81, 252; 7 Taunt. 97.

A defendant in replevin does not, by giving time to the plaintiff to replevin, discharge the sureties in the replevin bond. Gibbs, C. J., distinguishing it from the case of bail, said where the plaintiff has given time to the principal, the bail are put in a new situation, for as the plaintiff could not, during that time, take the defendant, so neither can the bail whose right grows out of the plaintiff's.

Watson on Awards, 2, 12; where the defendant has been holden to bail, the plaintiff in referring the cause should take a verdict: otherwise the bail are discharged.—Tidd, 6th edition, 866; 2 Arch. 283; 2 Saund. 72 b. n.; 1 Arch. New Prac. 206-7.

Barry v. Eccles, 2 U. C. Rep. 383; that a reference to arbitration by bond of an action of assumpsit entitles a defendant in close study or mesne process for want of bail to be discharged.

That an award may be pleaded *puis darrein continuance*.—8 Taunt. 146; Lowes v. Kermode, 2 Moo. 30; Storey v. Bloxham, 2 Esp. 504.

But after the day of payment, performance must be shewn.—Billings on Awards; Caldwell do.; 2 Tyr. 113; Allan v. Milner, 2 C. & J. 467, S. C.

Though the submission to arbitration is not a stay of proceedings unless so expressed.—Tidd. 876; 1 Mod. 24; 3 Lord Ray. 789.

If the plaintiff was resisting the award as invalid, and not binding upon him, as in Lowes v. Kermode, supra, or if the defendant was at large and merely wishing to set up the award as a defence, as in Storey v. Bloxham, supra, the argument, that a plea of puis darrein continuance duly verified would be applicable; but here, although the defendant did strive to set aside the award, the plaintiff opposed it, and now both parties are abiding by it, and the plaintiff has, from the time it was made, sought to uphold and enforce it; neither party impeaches it on this application.

Now, although the defendant might plead the award puis darrein continuance, though perhaps not without shewing performance, if not entirely too late, having omitted to do so last term, yet this is an application to the equitable interference of the court, and it is to be considered, whether, under the circumstances, the defendant should or should not be discharged.

Treating the award in the light of a confession, it is clear he would have been so entitled had he applied before the first instalment became due—and had defendant been at large on bail, it is equally clear, that they would be entitled to be exonerated.

As the proceedings stand, it may be, that if the plaintiff was desirous of proceeding to trial and judgment, the defendant might plead the award in bar of the further maintenance of the suit, or that he could not do so now, or at least not without averring performance; but the plaintiff may not choose to go on, and if so, what could the defendant do to put an end to the cause? He cannot nonsuit the plaintiff for not proceeding to trial, for the cause has been taken down to trial already, and if he sought to go to trial by proviso, such a step would be equivalent to admitting the plaintiff's right to proceed and waive the right to plead the award.

The only course that seems to me open to him would be to plead *puis darrein continuance*, and force the plaintiff to issue thereon. It is, perhaps, now too late so to plead, and if the defendant could not so plead without performance, it would not be a valid plea.

Were the defendant, therefore, to give notice of trial by proviso, the plaintiff might object on the ground that an award has been made, or if he paid no attention to it, and the defendant went on and got a verdict, he would still have the award in his favour to rely upon, but if he desired to stay the defendant going to trial by proviso, I should think he could do so by applying to the court, and if so, I do not see that the defendant could not equally stay his proceeding if he offered to proceed to trial, notwithstanding the award, and his adoption of and acquiescence in it.

There is another ground not taken in the argument, that is not immaterial. The defendant being a close prisoner, the plaintiff is, by Rule H. T. 26 Geo. 3, required to proceed to trial on final judgment within three terms next after delivery of the declaration, or after trial or judgment, to charge him in execution within two terms after such trial had or final judgment obtained, if by the course of the court he can so proceed, unless good cause shall be shewn to the contrary, but no treaty or agreement shall be a sufficient cause to prevent a defendant's having the benefit of a supersedeas for want of prosecution, unless the same be in writing, signed by the defendant or his attorney, or some one duly authorised by the defendant, and it is therein expressed that proceedings are stayed at the defendant's request.

Now here, by the course of the court, the plaintiff ought to have proceeded to trial or judgment in Michaelmas Term last, and not having done so, the defendant is prima facie supersedable. The cause shewn against it is a treaty or agreement to refer the cause to arbitration; but it is not therein expressed, that the proceedings are stayed at the defendant's request, and if stayed by implication, though not expressed to be stayed at all, it must follow that they are so stayed till an award be made, &c., and when made that they are thenceforth indefinitely stayed. It follows, therefore, that the proceedings are not stayed at all, or, at all

events, not in the terms of the rule above recited, or that if stayed they were indefinitely and permanently stayed, and, in either event, the defendant would be entitled to his discharge. The plaintiff cannot contend they were stayed by the agreement to refer, so as to excuse his going to trial, and while the award was made, but no longer stayed after the award was made. The defendant seems literally within the rule entitling him to be superseded, and, I think, virtually—an award having been made. The award (as said by Heath, J., of the cognovit, 1 Taunt. 159), is a new modification of the debt, and the plaintiff, by acquitting the defendant of the former debt, entitles him to his discharge. As to supersedeas, see 1 C. & M. 576; Hewitt v. Milton, 3 Tyr. 502, S. C.

I, of course, assume the award to be good and binding on the face of it; the plaintiff has not objected to it as insufficient or void, and the defendant, on this application, relies upon it.

I am on the whole, therefore, of opinion, that although the defendant does not shew payment of the instalment due, that he is nevertheless entitled to his discharge, but only on entering common appearance in case it should be hereafter material.

Note.—The latter part of the order was afterwards struck out, the defendant having pleaded by attorney, and so having an attorney on record. But the learned judge was induced to make this order, in the impression that the suit was at an end, and the defendant entitled to be discharged unconditionally, by reason of the reference to arbitration and award, and if not at an end, he entertained the impression that, as respected a common appearance, he was sufficiently in court in having appeared by his attorney, who, on the record, had pleaded and acted for him.

Per Cur. - Rule absolute. - Prisoner discharged.

QUEEN'S BENCH.

EASTER TERM, 12 VICTORIA.

Present-The Hon. J. B. Robinson, C. J.

- " Mr. Justice Jones.
- " MR. JUSTICE MCLEAN.
- " MR. JUSTICE DRAPER.

The Hon. Mr. Justice Macaulay, having sat in the Practice Court during last term, gave no judgments.

DOE DEM. DUNLOP V. SERVOS.

Before a stranger can be allowed to give evidence of declarations as to pedigree, made by a relation of the family—there must be shewn—1st. The death of that relation—and, 2ndly—The fact of his relationship to the family—which fact must be proved allunde, and not by his own assertion.

A patent was granted to A., of part of Lot No. 4, and to B. of part of Lot No. 5—More than forty years ago, a division fence had been run between what was then supposed the boundary line of Lots 4 & 5, according to which the proprietors of the two lots had ever since respectively occupied. C. (the defendant in this ejectment) holding under B.'s patent, claimed a part of Lot 4, not as embraced in the patent, but as being actually possessed by him and others before him in the title of B., as part of Lot 5, and so considered both by the proprietors of 4 & 5, until very recently. D. (the lessor of the plaintiff) claiming under A's patent, brought his action against C. to recover part of Lot 4, notwithstanding C's possession of the part claimed for 40 years, hoping to do away with the effects of the Statute of Limitations, by proof of the following facts—A's patent was issued in 1796. A., in Feb., 1802, mortgaged in fee to E., to secure the payment of 825L in October, 1802. In 1810 E. conveyed in fee to F. In 1829 the heir of F. brought ejectment against A., the mortgagor, who had remained in possession ever since the mortgage of 1802—and recovered. Nothing was shewn to bave been actually done by any of the parties claiming through A., to disturb D's possession under the old division line. But, Held per Cur., that the Statute of Limitations had commenced to run against A., from the time of B.'s possession of the land in dispute under the old division line—that neither the mortgage given by A.—nor the ejectment brough against him—had any effect upon the statute—and that therefore C's title (the defendant in this suit) under the possession of B.—must prevail.

Ejectment for land in the township of Grantham, claimed by defendant as being parts of Lots No. 5 in the first and second concessions, and claimed by plaintiff as part of Lots No. 4 in those concessions, specially described in the consent rule by metes and bounds.

The lessor of the plaintiff was Alexander Dunlop, who claimed as heir of the late James Dunlop, Esq., of Montreal.

A patent issued on the 15th of December, 1796, to Colin McNab, for Lots 2, 3 & 4 in the first, second and third concessions of Grantham.

It was shewn on the part of the plaintiff (subject to some exceptions urged against the sufficiency of the evidence), that on the 16th of Feb., 1802, Colin McNab made a mortgage in fee of all the above lands, being 950 acres, to Joseph Edwards, Esq., to secure payment of 815% with interest from the date, on the 1st of October following.

This deed was registered on the 25th of February, 1802, and being lost it was proved by the production of the registry book containing the record of the memorial; and one of the subscribing witnesses was called, who proved that he had witnessed a mortgage of these lands between the parties about that time.

On the 30th of October, 1810, Joseph Edwards conveyed the 950 acres described as in the patent, and in the former conveyance to James Dunlop, the deed being registered on the 5th of January, 1811. The deed itself was admitted to be lost, and it was proved by the production of the registry book, in which it had been re-registered on its production to the commissioners, under the statute 56 Geo. 11I., ch. 16, passed in consequence of the destruction of the records of the Niagara Registry Office by fire during the late war.

The plaintiff then gave evidence to prove that he was heir of James Dunlop, who has since died, being the oldest son of Alexander Dunlop, eldest brother of James Dunlop.

Some exceptions were taken to the sufficiency of that evidence.

It was admitted by the defendant, that the premises in dispute did really form a part of Lots No. 4 in the first and second concessions; but, besides raising objections to the sufficiency of the plaintiff's evidence as regarded the heirship, he contended that the title of James Dunlop or his heir was extinguished by the effect of the Statute of Limitations.

Upon that point the proof was, that from the first occupation of the patentee, Colin McNab, more than forty years ago, there was a division fence between him and the proprietor of Lot No. 5, according to which they respectively occupied.

The lots 5, 6 & 7, in the first, second and third concessions, had been granted by the crown to one John McNab, and the defendant claimed the land in question, not as being properly embraced, according to accurate survey made to him under John McNab's patent, for it seems that was not the case, but as being actually possessed by him and those before him in the title as part of Lot 5, and so considered both by the proprietors of Lot No. 4, and Lot No. 5, until a recent period.

The jury found, that in fact possession was taken of the premises in dispute both in the first and second concessions, by the owners of Lot No. 5, claiming and holding the land as part of No. 5 for as much as forty years before 1845, when this action was brought, and that during all that time the owners of Lot No. 4 had suffered themselves to be dispossessed, and they gave a verdict for the defendant.

There was no proof of payment of any part of the mortgage money or interest secured by the mortgage to Edwards, made in 1802.

Neither James Dunlop nor his heir was shewn to have been ever in Upper Canada, but Joseph Edwards was living here when the deed was made to him, and from thence till his death.

Colin McNab remained in possession after he made the mortgage to Edwards continually till his death, and after him his widow and heir, or persons holding under them, until 1829, when the heir of James Dunlop brought ejectment and recovered, that is, recovered the lots conveyed by the mortgage, but no change of the boundaries, according to which the respective occupants had held possession, took place in consequence of that ejectment.

Sullivan, Q. C., and Phillpotts for the lessors of the plaintiff, on the points reserved, cited, first in support of the sufficiency of the evidence to prove the heirship, 13 Ves. 140—511; 2 M. & P. 20; 1 Ry. & M. 297; 6 Moore, 183; 15 E. 293; Buller's N. P. 294; the Banbury Peerage case—4 M. & S. 496. Secondly, as to the Statute of Limitations, 7 Bing, 246; 3 A. & E. 63; 8 M. & W. 550; 4 Will. IV., ch. 1, sec. 52,

Cameron, Sol. Gen., and Vankoughnet, for the defendant, relied upon the following authorities: 2 Russell & Mylne, 155; 1 C. & J. 591, 10 Ea. 120; the Berkley Peerage case, 2 M. & R. 28; 4 B. & Al. 53; 2 Bing. 86; 3 Stark. Ev. 832.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the plaintiff did not shew himself entitled to a verdict by the evidence given at the trial.

It appeared to be conceded, that, as regards the abstract merits of the case upon the mere question of boundary, the right is with the proprietor of Lot No. 4, for the possession originally taken by the proprietor of No. 5, and continued through a long series of years, seems to have been a wrongful encroachment upon the Lot No. 4.

But whether, under the circumstances proved at the trial, the original patentee himself, if he were living, could insist upon a correction of the error and regain possession of the land in dispute, is another question.

Excluding for the present from view the objections raised respecting the proof of heirship, and any other peculiarity in the case, the jury, it is plain, under the charge which they received from the learned judge at the trial, considered the plaintiff barred from recovering, on account of the length of time for which he and his predecessors in the title had suffered themselves to be dispossessed.

They found, that the piece of land in question had been actually taken possession of for more than forty years before this action was brought by a stranger to the plaintiff's title, and continually since held as belonging to the proprietor of No. 5.

Such possession for forty years would avail against all exceptions in the Statute of Limitations in favour of the proprietor of Lot No. 4, on account of infancy, absence beyond sea, &c.; and indeed, so far as the Statute of Limitations would affect the title, twenty years dispossession would be as fatal to the plaintiff's case as forty, because it is clear upon the evidence that none of the exceptions in the statute could apply. Mr. Edwards was entitled to the possession, at least, in October, 1802, when the mortgage money fell due, if not before, and he was, therefore, then in a condition to bring ejectment, and he lived ten years and more after that time, during all which period it appears he suffered himself to be dispossessed of the land in dispute by a person claiming title.

The statute then must have begun to run, and no exception from nonage, absence, &c., could prevent its continuing to run. If, as was contended on the argument, we were bound to consider that the mortgage money was duly paid, there being no evidence to the contrary, and no proof of any payment under it made at any later day, yet that would only shew, that Colin McNab, the mortgagor, might have brought ejectment when possession was first taken against him, and so the statute would have begun to run against him if not against Edwards.

Take it either way, the effect of the possession by a stranger under claim of title for twenty years, five years of such possession being subsequent to our new Statute of Limitations coming into force, must be equally decisive. The evidence appears to us to supply clear proof of such possession; and the learned judge who tried the cause, as well as the jury, took that view of the case, as regards the facts.

Before the new Statute of Limitations there might have been room for contending, that possession of the land in dispute being taken and held by the proprietor of Lot No. 5, under a mere mistake as to bounds, considering it to be part of No. 5, and not intending to dispute the right of Colin NcNab or of Edwards to the whole of Lot 4, such possession could not be treated as adverse; but, without expressing any opinions as to the effect of such circumstances under the old Statute of Limitations, we are clear that under the present statute, 4 Will. IV., ch. 1, where the twenty years have run out, including five years after that act came into force, any distinction between adverse and non-adverse possession becomes immaterial; and we have only to enquire whether the title of the person dispossessed has been acknowledged in writing within the period, or whether rent has been paid to him.

As to the recovery in ejectment by the heir of Dunlop in 1827, of the premises mortgaged to Edwards, of which recovery evidence was given on the trial, it can have no material bearing upon the question, whether this plaintiff is barred under the statute.

That action was brought against Mr. McDougall, who claimed as a purchaser at sheriff's sale, under a writ of \hat{p} . $f\alpha$. against the lands of Colin McNab. The case is reported in Taylor's Reports, 640. It is plain that the only effect of it could be to establish against McDougall, and those claiming under him (and that not conclusively), that the lessor of the plaintiff in that action was entitled to the possession of the lands for which the action is brought. It could have no effect binding on the defendant Servos, between whom and McDougall there was no privity shewn; and, as there was no actual disturbance of Servos' possession in consequence of the recovery in that ejectment, and no change made in the occupation of the piece of land now in dispute, it is impossible that the mere recovery of certain lots of land can have any effect on the operation of the Statute of Limitations, because that depends solely on the fact of possession.

It may be useful to both parties to have this intimation of the present opinion of the court, upon the point of the plaintiff being barred by the statute, taking the case as it stands upon the evidence given at the trial. If that evidence has been in any respect misapprehended, or if the facts can be shewn upon another trial to have been in fact different as regards the possession, the plaintiff can of course do as he is advised, with respect to persisting in his attempt to gain possession of the pieces of land in question.

But, independently of the fact of the owner of Lot No. 4 having so long been dispossessed of the land, we are all of opinion that the plaintiff failed at the trial on the other ground, that is, in giving legal proof of his heirship, so that for that reason, if for no other, the defendant was entitled to a verdict.

It is true, that in the ejectment which I have already referred to, brought in 1827 upon the same title, the same person who is now lessor of the plaintiff proved himself, as it appears, to the satisfaction of the court and jury, to be the heir of the late James Dunlop, who was assignee of Joseph Edwards, the mortgagee of Colin McNab.

No question, as to the sufficiency of the proof of heirship then given, seems to have been raised at the trial, or afterwards in banc.

If the evidence were the same as that given in this case, the defendant in that case perhaps took no exception to it, or did not dispute the fact of heirship. But the evidence may have been of a different character, and I think it was, for I was concerned in the case, and I know that at or about that time a relation of the late James Dunlop was in this province, and he was probably a witness in the cause.

However that may have been, we consider it clear, that the defendant's exception against the admissibility and sufficiency of the evidence that was given in this case was entitled to prevail; for in the first place, it was not shewn that Mr. Alexander Dunlop, the brother-in-law of Capt. Gordon, whose declarations respecting the relationship were proved by Capt. Gordon, is not now living, and that alone is decisive of admitting his declarations in proof of pedigree. That he was not proved to be dead

is clear, for the learned counsel for the plaintiff admitted on the argument ast term, that he did not even then know whether he was living or not.

As to any question about Capt. Gordon coming within the rule in regard to declarations, on account of his being connected only by marriage with the family of the Dunlops, there was no room for such a question here, because he was actually a witness on the trial; his declarations were not offered, but the declarations of Alexander Dunlop, which Capt. Gordon was required to prove.

It was, however, as we still think, a good objection, that neither Capt. Gordon nor any one else proved the Alexander Dunlop in question, to have been of the same family as the late James Dunlop, or in any degree related to him; whereas that fact certainly was necessary to have been proved, in addition to the declaration of Alexander Dunlop as a foundation for admitting

his declaration.

The declaration of Alexander Dunlop on that point could not have been sufficient to let in the other. The relation in which the deceased person stood must in such cases be proved aliunde, otherwise evidence to support a case of this kind might be got up on the declaration of the merest stranger, first receiving his declaration to establish the supposed relationship, which alone would make his declaration of any weight, and then receiving his declaration as to the principal fact.

In the opinions given in the House of Lords, in the Berkely Peerage case, Lord Eldon and Sir James Mansfield both state the necessity of proving aliunde the relationship of the deceased person to the family which is to be the ground of receiving his declaration. And in the case of the Banbury Peerage that point was also determined.

For these reasons then — that the plaintiff in this case did not prove that Mr. Alexander Dunlop was dead at the time of the trial—nor that he actually stood in any degree of family relationship to the late James Dunlop — we think the evidence was clearly defective, and that the defendant should have had a verdict, whatever might have been the law of the case as regards the Statute of Limitations.

Per Cur .- Rule discharged.

DOE DEM. DUNLOP V. McNAB.

Under the old Statute of Limitations, 21 Jac. I., the possession of the mort-gagor, when not adverse, would not bar the mortgagee.

The mortgagor being in possession at the time of a conveyance in fee by the mortgagee, is no objection to the conveyance, the doctrine of dissessin not

applying as between mortgagor and mortgagee.

Where several lots of land are mortgaged, and the mortgagor and his heir remain in possession of one of them for more than twenty years, so as to bar, under our statute 4 Will. IV., the mortgagee's title; Held, per Cur., that the mortgagor's title by possession is not, like that of a mere trespasser, confined to the land which he actually occupies, but covers the whole land included in the mortgage, as well the lot upon which the mortgagor lives, as the other unoccupied lots.

Where interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and,

consequently that the mortgageee has no subsisting title.

Ejectment for land in the township of Grantham, specially described in the consen rule, and consisting of two small pieces of land claimed

by defendant to be part of Lot No. 4 in the third concession of Grantham,

In this case the same evidence was given as to the heirship of the plaintiff, and the several conveyances to Edwards and to James Dunlop, as was given in the case of the same plaintiff against Servos, tried at the same assizes; and a verdict was entered for plaintiff by consent, subject to several objections taken by the defendant, who contended.

ist. That the lessor of the plaintiff was not proved by legal evidence to be the heir of James Dunlop.

2ndly. That the plaintiff claiming under the mortgage to Edwards, could not recover, because Edwards never entered, and no written admission of his title, nor proof of any payment of interest within twenty years from the time of his title accruing was shewn; the mortgagor and his heirs being all the time in possession.

This objection was to be considered in reference to the premises in question in this action, which are part of Lot No. 4 in the third concession, being wild land not actually occupied by any one till within twenty years before this action brought. Colin McNab lived and died on Lot 4 in the first concession of Grantham, which formed part of a large tract of 950 acres, granted to him in the same patent, and of which Lot No. 4 in the third concession of Grantham formed also part.

This case and Doe dem. Dunlop v. Servos were argued at the same time and by the same counsel—the authorities cited appear in the preceding case.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, for the reasons given in the case of Doe dem. Dunlop v. Servos, that the verdict which has been rendered in this case for the plaintiff cannot be sustained.

It was not shewn by legal evidence that the lessor of the plaintiff is the heir of the late James Dunlop, the only evidence on that point being the testimony of Captain Gordon, as to what he had heard his own brother-in-law, Alexander Dunlop, say, without its being proved that this Alexander Dunlop was not living at the time of the trial, and that he really was of the family of the late James Dunlop, or stood in any degree of relationship to him.

In regard to other questions raised, both in this and the other case, upon the Statute of Limitations, the facts do not apply in the same manner to the two cases.

The piece of land in dispute in this action is in the third concession, and is admitted on both sides to be part of Lot No. 4, and unquestionably embraced in the patent to Colin McNab. It is not land that has been actually occupied, as the land claimed in the other action had been, by a person assuming to hold under an independent title, and, therefore, while Colin McNab or any person holding under him was at any time in possession generally of the 950 acres granted by his patent, occupying any part of it—he must at such time be deemed to have been in possession of this portion, as well as of that on which he might have been actually residing.

Then this being so, it seems to follow, that the fact of the mortgagor and his family having been allowed to remain in possession from the execution of the mortgage until 1827, when this lessor of the plaintiff

recovered in ejectment, and was placed in possession, cannot signify, because the effect of that possession, which was put an end to before the new Statute of Limitations was passed, must be judged of according to the old statute, 21 Jac. I. It was not adverse in the view of that Statute, and could not bar the mortgagee. Doe dem. Surtees v. Hall, 5 B, & Al. 687, is clear upon that point.

Then, when the heir of James Dunlop, claiming under the mortgage assigned by Edwards, recovered in ejectment, and was put in possession in 1827 generally of the lands mortgaged, including Lot 4 in the third concession, he was in actual possession of that lot, as well as of the others, all being held by him under one title, and no other person being in possession of that lot at the time. It was rightly determined, as I apprehend, in the ejectment brought in 1827, that the mortgagee or his assignee had not lost the estate by allowing the mortgagor to continue in possession, for any presumption of payment that might otherwise have been entertained after the lapse of twenty years, was repelled by evidence given at that trial.

A mortgagor remaining in possession is considered to be occupying permissively; and whether Colin McNab's heirs after his death would be looked upon as standing in any other position, was a point discussed on the argument of the ejectment in 1827.

The court then seemed to consider the case in that respect as not coming within the language of Lord Holt's dictum in Smartle v. Williams, I Salk. 245, as of course it did not, if it was proved at the trial (as the report states), that there had been treaties and conversations respecting the payment of the mortgage between Mr. Dunlop's agent, and the widow and heir of McNab after his death, as well as with McNab in his lifetime.

The case of Smartle v. Williams, as reported in 3 Lev. 387, is indeed very material otherwise in its bearing upon these two ejectments, particularly with reference to a point made in the case against Servos, that Edwards could not legally convey to Dunlop, because at the time he did so the mortgagor was in possession.

The court, in Smartle v. Williams, wholly rejected that application of the doctrine of disseisin as between mortgagee and mortgagor.

It is besides to be considered, that twenty years had not elapsed between the time of Colin McNab's death and the trial of the ejectment in 1827, so that if the heir could be looked upon as standing upon a footing different from the mortgagor himself, still there could have been no bar at that time under the statute.

If this had been otherwise, and if the mortgagor or his heir had held a possession of the property generally, such as would bar under the statute, they must have been considered as holding possession of this lot in the third concession, as well as of any other parts, although they might never have actually lived on that portion or in any other manner occupied it, because the mortgagor continuing in possession for more than twenty years after the mortgage is not like a mere trespasser, whom the right owner had neglected to remove for so long a time; he has the benefit of the presumption that the money was paid at the day, in which case he would be a rightful claimant, and his possession would be construed to be co-extensive with his meritorious claim; it would cover

the whole land included in the mortgage, and not be confined, as in the case of a mere trespasser, to the land which his occupation covered, so long, I mean, as there was no portion of the land in the possession of any other person.

In order to dispose of the rule before us, it was only necessary to say, that the plaintiff failed in proving himself the heir, and therefore could not recover. What I have said on the other points of the case may assist, so far as my opinion goes, in enabling the plaintiff to determine whether a new trial would be of use to him, in order to supply the defect on that point.

In Wilson v. Witherley, cited in Buller's N. P. 110, the court held it to be clear, that where interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money was paid at the day, and consequently that the mortgagee has no subsisting title; but here, as I understand the evidence, the mortgagee or his assignee did actually gain possession in 1827, and from that time to the bringing of this action there can have been no bar from lapse of time.

Per Cur.-Postea to defendant.

ADAMS V. HAM.

Where a plaintiff by his own act—as, by a reference and an award—has knowingly discharged one of two joint trespassers—he cannot bring an action

against the other.

A verdict or an award, specifying the amount of damages against one of two joint trespassers, is in itself a bar, whether paid or not, to any action against the other, and has the same effect as a satisfaction by him would have had in precluding any action against his co-trespasser—it is, therefore, unnecessary, in the plea to an action of trespass, setting out the award of damages—to aver, that the sum awarded has been paid. It would be different, however, in pleading an award to an action of debt, in which two are jointly bound—there, unless payment of the award be averred, it is no bar.

Where the submission does not require the award to be made and ready to be delivered within a certain time, it is not necessary to aver, that the award was made within a reasonable time—neither is it necessary to aver notice of

the award to the plaintiff.

Trespass quare clausum fregit, &c. &c.

Plea. That as to the taking and receiving to his own use the issues and profits of the said land, the plaintiff should not further maintain his action, because one Vansicklen was guilty of that trespass jointly with the defendant; and that the plaintiff, well knowing this, he and Vansicklen did, after the commencement of this action, submit all causes of action, trespasses, damages and demands whatsoever, at any time tried, made, done, performed, covenanted or depending, &c., between them, to the award of certain arbitrators (not stating any time within which the award should be made); that the arbitrators proceeded under the submission, and having heard the parties, and all persons and matters whatsoever, which either of them advanced or produced under the said submission, did, on, &c., under and in accordance with the submission, award of and concerning the matters so referred to them; that Vansicklen should pay to the plaintiff 3l. 15s., on or before the 25th day of October following, with the costs, of the arbitration, and did declare that the award should be a final settlement between this plaintiff

and Vansicklen to the date of the award, so that the one should have no further claim on the other. And the plaintiff averred that this award fully discharged and acquitted him of the trespass.

The plaintiff demurred to the plea:

rst. Because it did not state that the trespass to which it was pleaded was included in the award, or was brought in question before the arbitrators.

andly. Because it was not stated in the plea, within what time the award was to be made, nor in what manner. Neither was it averred that the award was published within the time limited.

3rdly. Nor that the defendant had notice of the award.

4thly. Nor that the award was binding on the parties.

5thly. Nor that the money awarded against Vansicklen had been paid.

7. Lukin Robinson, for the demurrer, referred to the following authorities: 9 Co. 70, a.; 2 Tyr. 113; 1 Y. & J. 19; 3 Tyr. 113; 2 C. & J. 47; 6 Taunt. 20.

A. Wilson, contra, cited 1 A. & E. 491; 1 U. C. R. 214; 2 Esp. C. 504; 9 Jurist, 808; Hob. 66; Carth. 19.

ROBINSON, C. J., delivered the judgment of the court.

From the form of the declaration in this case, I infer the action to have been brought for mesne profits after a recovery in ejectment, but, looking only at the record, we cannot be certain that it was so,

If we were entitled to assume it, then the case would be so much the stronger in favour of the defendant, because if this were an action for mesne profits following a recovery in ejectment against Ham and Vansicklen as defendants, then there would be no apparent unfairness in assuming that when he referred to arbitration all his causes of action against either, he had this in his mind and intended to refer it, at least so far as regarded his right of action against Vansicklen, and if that were so, then he must submit of course to the legal consequence of Ham's being discharged.

We are of opinion that the first is not a good exception. Where the submission is general, as this is, of all causes of action, and the award directs, as this does, that one party shall pay to the other a certain sum as a final settlement between them, and that one shall have no further claim upon the other, it cannot be denied that such an award, made on such a submission, includes everything that could, at the time of the submission, have been made the ground of an action by one against the other.

As to this particular trespass not being made a ground of complaint before the arbitrators, the authorities cited by this court in Lusty v. Vanvolkenburg, I U. C. R. 214, which was referred to in the argument, have determined, that when either party to a reference is aware of the demand or cause of action, and yet does not insist on it, he cannot make it the subject of an action afterwards; and that seems reasonable.

The declaration in this case expressly avers, that the plaintiff, before the submission, knew of the cause of action against Vansicklen for the trespass committed by him and the defendant jointly; and I do not, therefore, see how we can do otherwise than hold that the award has concluded him as to Vansicklen, so that he can never sue him for the trespass; and that being so, the effect is the same as if he had released him from all actions,

and that with a full knowledge of his being a party to this trespass.

That brings the case within the principle of the decision in Cocke v. Jennor, Hob. Rep. 66. My impression during the argument was, that the fair construction of the submission would include only causes of action between the two, and that the plaintiff cannot be supposed to have intended anything more; but it did not sufficiently strike me, that the defendant here does expressly aver the plaintiff's knowledge that the defendant and Vansicklen were joint parties to the trespass, for when that is considered, we are not at liberty to say that the plaintiff may not have meant to include this cause of action. He would certainly be concluded by it as against Vansicklen, and that being so, he has knowingly discharged one of two joint trespassers by his own act, and cannot therefore urge his remedy against the other.

Besides, according to the statements in this plea, the reference and award must have covered every demand, trespass and cause of action that the plaintiff had against Vansicklen; and it is averred, that the arbitrators did award concerning the matters that were referred to them, that Vansicklen should pay to the plaintiff a certain sum of money. Being thus told of this cause of action, and knowing of no other, we must look on the sum awarded as damages given for this trespass; either exclusively for that, or for that and all other causes of action, if there were others, and so the award of specific damages against one of the trespassers is a bar to any action against the other, on the principle maintained in Broome v. Wooton, Yelv. 67, and has the same effect as a satisfaction by him would have had in precluding any action against his co-trespassers.

If it had been a debt for any sum certain on which the two were jointly bound, then a recovery or award against one, without shewing satisfaction of the judgment or payment of the award, would not have been a bar; but it is otherwise in cases like this, when the claim is several for a tort, and the damages are to be measured by a jury. There, whenever in an action or by an award certain damages are given against one, there no longer remains a right to bring an action against the other party liable, as if the cause of action were still open and at large. The principle of transit in rem judicatam is held to apply; and this shews that there is nothing in the fifth cause of demurrer specially assigned, viz., that the plea does not state that the sum awarded had been paid.

We do not think that there is anything in the other causes assigned. If the submission had required the award to be made and ready to be delivered within a certain time, then it would have been necessary to shew that those conditions were observed; but nothing is said of any such limitation as to time, and we cannot say that parties may not legally dispense with it, as for all we know they did in this case.

It might be contended, that upon such a submission the award must be made within a reasonable time, and that it should be so stated.

The plea sets forth an award made in a fortnight after the submission. In Mr. Chitty's Forms, 2 Ch. Pl. 479, I find an award pleaded as this is, upon a submission, without limiting any time, and the award is set forth as it is here.

I can see no occasion for averring notice of the award—the forms do not require it. It was a proceeding between other parties, and the

question is only as to its legal effect at the time of the plea pleaded, which must be the same whether the plaintiff had before received notice of the award or not, there being no stipulation in the submission as to notice.

It is to be considered, that in this case, the plaintiff, as the plea states, had commenced his action before he entered into the submission with Vansicklen; but that cannot affect the question, because he might have brought several actions against each for the same trespass, and though he could have but one satisfaction, yet he could make choice of the best damage, as the court say in the case of Cocke v. Jennor. But if, while his two actions were pending, he were to release the defendant in one of them, he could not proceed in his action against the other, and so having damages awarded against the one separately, he can no longer bring his action for the trespass against the other or against either, whether the damages awarded be paid or not.—Allen. v. Miller, 2 Tyr. 113; 1 Lord Ray. 248; 1 Roll. 268; Com. Dig. Accord. D. 1; Com. Dig. Pleader, 3 M. 13; Watson on Awards, 148.

It is now generally held, that arbitrament without performance is a good plea, and the modern precedents conform to that; but in a case like this it never could have been a question, because when the plea was pleaded, the day for paying the sum awarded had not arrived.

For these reasons we are of opinion that the defendant must have judgment on this demurrer.

Per Cur.—Judgment for defendant on the demurrer.

DOE DEM. MCLEAN ET AL. V. FISH ET AL.

Where a Mortgagee has neither taken possession of the land mortgaged, after default—nor received interest upon the mortgage money within twenty years—the title is in the mortgagor—and the mortgagee, if suing in ejectment a third party in possession, may be non-suited.

This was an action of ejectment brougt to recover possession of one hundred acres of land, in the township of Darlington.

The crown granted the land on the 17th May, 1802, to Eliakim Weller, who on the 31st of May, 1811, made a mortgage in fee, of these and other lands, to Allan McLean, Esq., to secure a debt of £326 6s. od., to be paid with interest in certain instalments, the last of which was to fall due on the 3rd of June, 1813. By the terms of the mortgage Weller was to remain in possession till default made.

It was proved at the trial, that up to 1834 or 5, the land in question in this action, was a wilderness unoccupied by any one, and for all that appeared, neither Weller nor any one under him, or for him, had entered upon it,

No evidence appeared to have been given at the trial, of actual possession having been taken at any time, by any one; but it seemed to have been admitted that about twelve or thirteen years ago, a stranger, perhaps one of the defendants, had entered upon the land, and had since continued in possession.

The defendant gave no evidence of title—a verdict was rendered for the defendant, in accordance with the judge's charge.

P. M. Vankoughnet moved for a new trial on the law and evidence, and for misdirection.

He referred to the 17th sec. of the 4 Will. IV. ch. I; no cases cited.

D. B. Read shewed cause, and cited 5 Taunt. 170; Selw. N. P. 766; Bull. N. P. 110; 3 Br. C. C. 289; 2 Ves. Jr. 669; 5 B. & Al. 687; 5 Bing. 427; Powell on Mortg. 9; 1 Stark. Ev. 383; 9 Sim. 575; 5 A. & E. 297.

ROBINSON, C. J., delivered the judgment of the court.

Upon these facts we are of opinion, that the plaintiffs could not be allowed to recover.

While the land remained in a state of nature, as it was when the mortgage was executed in 1811, Weller the mortgagor was, in contemplation of law, invested with the possession, holding a patent for the land, and no one occupying adversely to him. The mortgagee recognized him as being in possession by the terms of the mortgage, stipulated that he might continue so possessed till default should be made in paying the mortgage money.

If any part of the money was unpaid after the time limited, then the mortgagee must inevitably have been entitled to enter on the 3rd of June, 1813, being the latest day, and supposing that all previous instalments had been regularly paid.

The defendants then contend, that within twenty years of the time when the mortgagee must have been entitled to the possession, if at all, he should have entered, or brought his action, and that he is now barred.

We are clearly of that opinion,

The mortgagee claims the land by reason of a forfeiture, and by the 17th section of our statute 4 Will. IV., ch. 1, the time of limitation began to run from the time of forfeiture, or condition broken. If finding the land vacant, he had entered within the period, he would have been under no necessity of bringing an action, or if he chose to do so he might have proceeded as upon a vacant possession; but never having asserted his right till after some third party has entered, he now for the first time claims possession under his mortgage, on the ground of an alleged default of payment. He is in effect suing on his security, and the 43rd clause of the statute 4 Will. IV., ch. I, applies to him, which prevents his proceeding to enforce his mortgage after a lapse of twenty years.

It has been urged, that the exception in the 17th clause of the statute applies in his favour, but that is a provision for protecting the grantees of the crown and their assigns, as between them and strangers usurping the possession. It does not apply so as to relieve the mort-gagee from the necessity of claiming under his security before twenty years have expired, and does not deprive the mortgagor of the protection of the statute, which is grounded on the presumption of payment.

The mortgagee could not after what has occurred, dispossess the mortgagor if he were now in possession, and that being so, he can as

little remove any other person enjoying peaceable possession.

In Wilson v. Witherly, Bull. N. P. IIo: Selwyn's N. P. 766; it was ruled by Lord Holt, "that if a defendant produces a mortgage deed "(to a third party) where the interest has not been paid, and the mort-

"gagee never entered, it will not be sufficient to defeat the lessor who claims under the mortgagor; because it will be presumed that the money was paid at the day, and consequently that it is no subsisting title, but if the defendant proved interest paid upon such mortgage, after the time of redemption, and within twenty years, it will be sufficient to non-suit the plaintiff."

This is decisive of the plaintiff's right to recover in the present case. If Weller had given no mortgage, he would have been under no necessity of making any actual entry in order to assert his title, for he would have no one to enter upon so long as the land remained unoccupied. But the mortgagee must on a certain day, in case of non-payment, have acquired a right to enter upon the mortgagor, who till default was to retain possession, and having made no claim to exercise such a right, nor offered to prove any default, till more than thirty years had elapsed, including five years since the passing of the statute, which distinguished this case from that cited of Doe dem. Jones v. Herbert, 5 Ad. & Ell. 291; he is now too late to put the mortgagor to proof of payment.

The law presumes that the money was paid at the day, and that the mortgagee never had a right to enter. And if he had such right, he has lost it. If we were to hold otherwise, then we must hold, that in the case of a mortgage upon land which remained unoccupied, the mortgagee might claim to enter by reason of an alleged breach of condition, at any distance of time. Whereas, in order to protect parties against the necessity of proving payment after any indefinite length of time, the law presumes it, where the mortgagee has neither taken possession nor received interest within twenty years.

Per Cur. - Rule discharged.

-GROVER V. BULLOCK.

General average—Where a vessel was shewn to have been dangerously stranded on our lakes, by accident arising from the perils of navigation, and without fault of the master; Held per Cur., that the expense incurred by the master in hiring a steamer to haul her off, with a view to the safety of the vessel and cargo, and by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo—upon a general average.

The plaintiff sued in assumpsit for contribution on a general average upon some goods of the defendants, shipped on board the schooner Isabella, at Kingston, to be carried to Presqu' Isle, on Lake Ontario.

The schooner in the course of the voyage, going in the night with a free wind, but in a thick fog, ran upon a small island or shoal, lying, near her track.

The master not being able to get her off, sent to Kingston for assistance, and after being two days on the shoal, she was hauled off by a steamer, with her cargo on board, and completed her voyage.

It was proved that while the schooner lay aground, she was exposed to the prevailing wind on the lake, and in great danger of being destroyed, and the cargo lost if a strong wind had sprung up. The accident occurred about the middle of November.

The defendant, among other defences, pleaded that the schooner was 5 U. C. Q. B.

run ashore by the neligence and want of skill of the master, and not unavoidably by stress of weather, or the perils of the navigation; and there was evidence to support that defence, for several other vessels in company, bound to the same quarter, escaped by giving the land a wider birth on account of the fog, which there was no difficulty in doing, the wind being free; and besides it was proved by the evidence of the mate, that the captain during his watch, while the mate was below, lay-to a considerable time, on account of the fog, but omitted to inform the mate of this when he came on deck and took the watch, at which time the vessel had again been put on her course.

Conflicting opinions, however, were expressed by witnessess on the trial, on the point of negligence or no negligence; and the jury, on that question being expressly left to them, found a verdict for the plaintiff, for £20, which seemed to be about the sum that ought to be contributed by the defendant, if he was liable at all. The question of liability was raised at the trial, and reserved for the opinion of the court in banc.

The defendant denied that there was in this Province any such law of general average as that on which the plaintiff sought to recover. He also contended that if such an action might lie here in some cases, it did not lie under the circumstances of this case, because the right of a plaintiff to recover upon such a state of facts had never been admitted in the courts in England.

D. B. Read for the plaintiff on the points 1eserved, referred to 5 B. & P. 550; 4 Tyr. 741; 7 T. R. 465; 2 E. R. 128; Stephens & Benneck on Gen. Average, page 60 et seq.; 1 E. R. 220; 4 M. & S. 141; 2 T. R. 407; 8 T. R. 509; Abbot on Shipping, 490, 434; Holt on Shipping, 483; 2 Pickering Rep.

P. M. Vankoughnet for the defendant cited A bbot on Shipping, 490; 6 Taunt 608; 2 N. R. 278; 3 M & S, 182; 3 B. & Ad. 523.

ROBINSON, C. J., delivered the judgment of the court.

This case has been ably argued on both sides. The law of general average has been recognized in the courts of this province, as applicable to our inland navigation, in cases where goods have been thrown overboard for the safety of the ship, and of the remaining part of the cargo, and the only question which appears to be open to argument is, whether by the law of England the facts of this case bring within it the law of general average.

Unfortunately any doubts on that point cannot be very satisfactorily dispelled by citing decisions in England expressly applicable, for these matters seem to be in general governed there by a usage among merchants well understood and generally submitted to, so that the several claims are adjusted by compromise, and seem in a very limited number of cases to have engaged the attention of courts of justice.

After perusing what has been written on this subject in the treatises of Benecke and of Stevens on the Law of Average it seems not to admit of a doubt that if we allow ourselves to be governed by what is received and admitted, and acted upon as law in such cases in the maritime States of Europe, and in the United States of America, we cannot refuse to recognize the case before us, as one for contribution upon a general average by all the parties interested in the voyage. And in the little that is said upon the subject of shipping and insurance, by Eng-

lish writers generally, though there are some things to be met with which may seem to make against the claim for contribution against the owner of the cargo under the circumstances of this case; yet it appears to me that the weight of authority, according to their statement of what has been adopted in England from the old commercial States of Europe, preponderates greatly in favour of this claim.

When, according to the terms in which the law is stated, such a claim is not expressly supported or would seem to be denied, it appears to me that it is only because room has been left for that inference by the subject being imperfectly treated.

In many English books, the law of general average is spoken of and even defined in such terms as would lead one to suppose that it only applies in cases of jettison, where during impending danger, the cargo or part of it has been deliberately thrown over for the preservation of the ship; but that the writers never meant so to confine it, becomes quite evident whenever they have occasion to go extensively into the subject.

Molloy, in his treatise *De Jure Maritimo*, a work of high authority (for it had passed through eight editions, more than a century ago), in his chapter on averages and contributions, after treating of the subject in the confined sense I have described—adds, nevertheless, in a distinct section, "contribution is to be paid for the pilot's fee, that hath brought a ship into a port or haven for her safe-guard (it being not the place she was designed for) so "to raise her off the ground, when there is no fault in the master."

We must take it, as the jury have found, that the ship in this case was not stranded from the fault of the master, and then this case comes precisely within what Molloy has laid down.

So the late Lord Tenterden, in his Treatise on Shipping, sets out in his chapter on general or gross average, by defining it "as a general contribution that is to be made by all parties towards a loss sustained by some for "the benefit of all;" which is comprehensive enough to take in the expenses incurred in getting off the ship for the preservation of the ship and cargo—Abbott on Shipping, 425.

So in another passage (page 430) he observes that "not only may the loss of goods become the subject of contribution, but also in some cases the expense incurred in relation to them." And he refers to the cases of the Copenhagen, I Robinson's Admiralty Rep. 289, and of the Gratitudine, 3 Robinson's Admiralty Rep. 257, and also to Da Costa and Newnham, 2 T. R. 407.

Where the learned author comes to treat expressly of stranding (p. 333), he does indeed appear to arrive at a conclusion at first sight unfavourable to the claim in this action, for he takes the rule to be "that if the stranding be voluntary, to save the ship and cargo, the damage done to the ship becomes a general contribution; but if it be involuntary, and the cargo be saved in the whole or in part, no general average is due." But there he is speaking of the claim of the ship owner to contribution for damage done to the ship, not voluntarily incurred to save the cargo, but involuntarily suffered without any view to the benefit of al!, and therefore a mere consequence of the perils of the navigation.

In the same passage he says, "if the stranding be the result of the ordinary perils of the sea, without any sacrifice on the part of the master, the expenses incurred must fall upon the ship alone."

That inference is drawn from the decision in a case cited from Beneck, who evidently considers it by no means inconsistent with a claim to contribution in a case like that before us, because he cites it with approbation while throughout his work, he sustains the doctrine, that in case of a ship being stranded, and in danger of destruction, the expenses incurred in getting her off, in order that she and the cargo may be saved, and that she may proceed on her voyage, are to be recompensed by a general contribution from those whose property is thereby saved.

Indeed, in the case which I have last referred to, the claim for contribution was denied expressly on the ground that the expenses had been incurred for no common object, the ship being driven by a high tide on the ground very near the port of destination, and the cargo unloaded, not with a view to set her afloat, but for delivery to the consignees. And the expense was incurred in digging out the ship for her own benefit, it being of no consequence to the consignees, whether she was floated again or not. Between that case and the present the distinction is obvious.

Mr. Park in his Treatise on Insurance, does not go very minutely into the subject of general average, but in what he does say, he supports the claim in this action, for he deduces from a consideration of the authorities, (chiefly those of foreign jurists) this comprehensive principle: "We may "gather in general from the description given of average, at the beginning of this chapter, that all losses sustained, and expenses incurred, voluntarily, and deliberately, with a view to prevent a total loss of the ship and "cargo, ought to be equally borne by the ship and her remaining lading," (page 124); and he illustrates it by a case quite similar in principle to the present.

Indeed, I find nothing in the treatise of Lord Tenterden or Mr. Justice Park, that makes against this action—nor any adjudged case—Covington v. Roberts, 2 N. R. 378, was relied upon by the defendant, but the grounds of the claim were there very different—there was no loss or expense voluntarily and deliberately incurred—it was a mere peril of navigation occasioned by special circumstances.

On the other hand, the language of the judges in Birkley et al. v. Presgrave, I E. R. 220, comes fully up to this case. Mr. Justice Lawrence, in particular, thus expresses himself: "Extraordinary sacrifices made, or "expenses incurred for the preservation of the ship and cargo, come within "general average; and must be borne proportionably by all who are in-"terested, and natural justice requires this."

It need hardly be said, that a principle resting on that foundation must be applicable in navigating our great lakes, as well as in case of voyages on the ocean, for "natural justice" is independent of such considerations, as whether the voyage is long or short, or the water salt or fresh. Plummer v. Wildman, 3 M. & S. 482, is also, I think, an authority in the plaintiff's favour.

From the view of the law of average, given by Beneck and by Stevens in their treatises, which were cited by Mr. Read in his argument,

it is perfectly plain, that they would consider this a case for contribution; coming under that class of cases, where one of the parties is entitled to a recompense from the others, as distinguished from those cases where the claim is for restitution of goods voluntarily sacrificed.

Mr. Beneck in page 138 of his treatise, as published by an American editor, gives us this precise case: "Where a vessel strikes by accident upon a shoal, the damage thereby occasioned to the vessel or her cargo is, with every other accidental damage, particular average; consequently the charges expended in order to repair that damage, are on first principles also particular average. But a stranded vessel in most instances is in danger of being lost unless speedy measures be taken for her preservation. These measures are general average so far as they serve to avert a danger threatening the whole concern. The expenses and damages incurred for repairing, or diminishing an already existing loss, must therefore be distinguished from those by which a future loss threatening the whole is intended to be avoided. The charges therefore of heaving a vessel off without discharging her, are general average, since they are incurred for the benefit of all concerned; and so it is a jettison, resorted to for floating and lightening the vessel."

It is true, that in the dearth of English decisions, and from the comparatively little attention which seems to have been bestowed upon this branch of commercial law by English text writers, both the authors referred to are driven to cite foreign jurists in support of the positions and distinctions which they have ventured to announce; but considering that the foundations of the whole doctrine are derived from such sources, and from the codes of commercial nations in Europe, which from time immemorial have been submitted to in such cases, it would hardly be expected that English text writers would feel themselves at liberty at their discretion to adopt some principles and discard others.

Whatever seems to be generally recognized in other countries as parts of the system, fairly depending on the great principle which is universally recognized, must of course be taken to be as applicable in England as elsewhere; unless where it can be shewn that the decisions of English courts of justice have established a different rule. I have seen no such decision that could be relied upon as exempting the defendant in this action from contribution.

The case of Power et al. v. Whitmore, 3 M. & Sel. 141, was referred to in the argument as being irreconcilable with the claim preferred by this plaintiff; but it does not go that length, and if it did, it could not be allowed to prevail against the greater weight of English authority of an opposite tendency.

In the multitude of passages cited from foreign writers upon commercial law, there is none that strikes me as containing a clearer and more reasonable exposition of the law than the following from Baldasseroni, an Italian, who states: "that he never heard it disputed that the charges of entering the nearest port, and the repairs of damage incurred to prevent shiptweek, belong to general average; but that a difference of opinion often prevails as to the cause and nature of the damage; that when it arises from a natural cause it is usual to bring to the account of general average,

"that part only which has been added to the damage for the joint benefit; "and to the account of particular average, that damage the cause of which is special (not having reference to the joint interest) or the repairs by which, without necessity, the ship's value has been increased, but that all the extenses of making a port for the general benefit, and all the consequences resulting from that step, have always been considered as subjects of a general contribution."

Considering that in this case the Isabella is found to have been stranded by accident arising from the perils of navigation, and without fault of the master; that, being aground in an exposed situation, without means of relief by the exertions of the crew, and in imminent danger of being broken up, if a strong wind had arisen before she had been got off, a contingency very probable at that season—we are of opinion, that the expense incurred by the master in hiring a steamer to haul her off, with a view to the safety of the vessel and cargo, and by which he was enabled to proceed to his destination, gives a claim to contribution against the owners of the cargo. The rule for arresting the judgment is therefore discharged, and the postea awarded to the plaintiff.

There was an objection taken to the verdict on account of the rejection of a witness called for the defendant, for the purpose of proving that the defendant's goods had not been shipped on board the Isabella by his authority. But this was not much insisted upon in the argument, and it is evident that the witness could not be produced for such a purpose, for the defendant, by paying into court the amount of freight upon the goods carried upon the same occasion, and sued for also in this action, is not at liberty to dispute the claim for contribution on such a ground.

Per Cur.-Postea to the plaintiff.

QUEEN'S BENCH.

SITTINGS AFTER EASTER TERM, TUESDAY, JULY 4, 1848.

Present,—The Hon. J. B. Robinson, C. J.
MR. Justice Macaulay,
MR. Justice McLean,
MR. Justice Draper.

THE HON. MR. JUSTICE JONES, having sat in the Practice Court during Easter Term, gave no judgments.

LOUNT V. SMITH.

There can be no repleader where the plaintiff has been non-suited, and so out of court.

Semble, that a plea of nunquam indebitatus to an action by the landlord against the tenant, for not giving him notice that he had beeen served with

a declaration in ejectment—is a material issue—upon which a judgment may be entered for the defendant—if the verdict be so found.

Action on the statute by landlord against tenant, for not giving him notice that he had been served with a declaration in ejectment.

The defendant pleaded "nunquam indebitatus,"—not nil debet, as he should have done.

The plaintiff gave no evidence at the trial of any declaration having been served on the defendant, and was non-suited. *Eccles* moved to set aside that non-suit; or rather conceiving that the non-suit was right so far as regarded the defect of evidence he moved to set it aside and that a new trial be granted with award of repleader, because he contended that "nunquam indebitatus" was a bad plea, and did not put any thing in issue.

ROBINSON, C. J., delivered the judgment of the court.

If the defendant can say truly at the time he is pleading his plea, that he never was indebted to the plaintiff in mannner and form, then of course he was not so indebted to him at the time the action was brought, which is the effect of the plea of nil debet. Although, therefore, the plea is informal and might perhaps be set aside, or held bad on demurrer, we cannot call it an immaterial issue, and the jury being sworn to try it, the plaintiff for want of evidence was non-suited, and so is out of court, in which case I take it there should be no repleader.

There can be no difficulty in recording the judgment of non-suit against him, though there might have been in entering judgment on a verdict for the defendant; when when the issue is immaterial, which, however, we do not hold this to be.

Per Cur.—Rule refused.

JONES ET AL. V. RUSSELL.

Where no power has been given by the rule of reference to the arbitrators to enlarge the time for making an award—the *court* have, notwithstanding, the power under our statute to enlarge the time, in the exercise of their discretion, upon the affidavits and papers filed.

Motion by J. Duggan for rule to enlarge the time for making an award until the last day of June, on grounds disclosed on affidavits and papers filed; or to set aside the verdict and grant a new trial.

The cause was referred by a rule of reference, at nisi prius; a verdict was taken for £868 5s. 5d., subject to be reduced or increased by the award of Mr. Robert Beekman, to whom "all matters in difference" were referred, "so as the said arbitrator do make and publish his award ready to be de-"livered, &c., on or before the first day of June, then next (now current); if "no award made on that day, verdict to stand and judgment to be taken for "that amount, as if verdict had been taken unconditionally."

On the 26th May, 1848, an application was made by the defendant in chambers to a judge, to enlarge the time for making the award till 24th July next; and the judge being in doubt as to the propriety of doing so, under the circumstances, merely enlarged the time till the first day of this term, meaning thereby to give the defendant an opportunity of applying to this court.

The application was accordingly renewed in this court. ROBINSON, C. J., delivered the judgment of the court.

Taking the power of the court to enlarge the time under the circumstances of the case, to be free from doubt, upon the words of the statute, and upon the authority of Newnham v. Parbury, 7 M. & W. 378, and other cases in England determined upon a clause in a statute precisely similar, we have yet come to the conclusion on a careful examination of the affidavits filed on both sides, that we ought not to accede to the application.

We find ourselves compelled to take this view of the case, not without regret, considering the very serious accident which has befallen the defendant in this cause, and the consequences to his health which we have no doubt it has produced. This has led us to press, so far as we could, upon the plaintiffs an arrangement by which they would waive the degree of expedition which we think they may justly insist upon, in consideration of receiving that security for the debt which the defendant has tendered. But the plaintiff, declining this for reasons which we cannot know to be unfounded, we have only to consider what we can rightly order without their assent. And looking at the whole case, it seems to us clear, as it did to the learned judge to whom the application was made out of term, that the plaintiffs ought not to be restrained from entering up judgment on their verdict,

It is of great consequence to suitors, that either should be held to abide by the conditions on which the other has been led to grant indulgences, or acceded to terms, unless where something unforeseen has happened which would make it palpably unreasonable to hold the party to his agreement.

Here the defendant ought to have been prepared to go to trial at the preceding assizes in October, according to the notice served upon him. The demand against him was of a definite character, a mere matter of contract not complicated in its nature. It was his duty before the cause came up there for trial, to have considered and marshalled his evidence, and given particular instructions to his attorney. He was in the country then, and without any impediment from ill health.

He put off the trial then, on the ground of absence of a witness alleged to be necessary; but there is reason to apprehend from what has taken place since, that he might well have gone to trial without that witness, and at the last assizes, when the case was again entered for trial, the defendant having in the mean time met with an unfortunate injury to his health of a most serious character, pressed on that account for delay, which, considering the description of action, and the former indulgence that had been granted, the court was not inclined to concede.

It was a liberal course that was then taken by the plaintiff's attorney when he assented to a reference to arbitration, but he exacted certain terms which the defendant deliberately agreed to.

They were not unreasonable; nothing unforeseen has occurred that we could fairly make the ground of depriving the plaintiff of what he expressly stipulated for.

The impression produced on our minds by a perusal of all the affidavits is, that the defendant's case was not likely to have sustained' prejudice if it had been submitted to the arbitrators within the time specified, with the lights which his attorney, and agents, and witnesses could have thrown upon it; and if it should have turned out otherwise, it could only have been because the defendant, in the many months that the action had been pending before he was under any disability from illness, had omitted to give his attention to it for the purpose of instructing his attorney.

The affidavits which the plaintiffs have filed, and the terms of the reference, place this case on peculiar grounds, and we think we have no right to expose the plaintiffs to the inconvenience, which for all we know may be very great, of a longer delay in receiving the benefit of their verdict, by relieving the other party from an engagement deliberately entered into, under a knowledge of the circumstances.

Per Cur. - Rule refused.

STFTON V. ANDERSON ET AL.

A. made his note payable to B., who indorsed to the defendants, and the defendants to the plaintiff.—The defendants (absconding debtors), were sued by the plaintiff, who averred in his declaration a presentment of the note to B., instead of to A.—The note was made solely for the accommodation of the defendants, without any consideration to A. the maker.—The plaintiff compromised with A., taking from him a portion of the note, and then discharging him, striking his name out of the note.—The jury gave a verdict against the defendants for the balance of the note; Held per Cur., verdict right.

Assumpsit against absconding debtors.

1st count, on note of James Gardiner, dated the 20th July, 1846, to John Ward, indorser at ninety days, for £483, indorsed by Ward to the defendants, and by the defendants to the plaintiff.

It was averred that the note was presented to Ward, instead of to Gardiner.

There was also a count on an account stated, and judgment by default. It was proved on the trial, that the note was made solely for the accommodation of Anderson and Beebee, the defendants, and without any consideration to Gardiner, the maker; that before it became due, the defendants absconded; that this plaintiff, who stood as endorser on the note, retired it when due from the bank which discounted it, and that he afterwards compromised with Gardiner, taking £120 from him, and discharging him, and that he then obliterated Gardiner's name from the note.

The learned judge thought the plaintiff could not recover under these circumstances, but took a verdict for the plaintiff, or rather had damages assessed at £400 9s. 8d., subject to the opinion of the court.

Hagarty moved to be allowed to enter judgment for that amount, or set aside his verdict, and amend his declaration (intending, perhaps, to add other common counts).

ROBINSON, C. J., delivered the judgment of the court.

The action being against absconding debtors, we are bound to see that sufficient was stated and proved to warrant a recovery against them, if the general issue had been pleaded, and had opened to the defendant all matters of defence as before the new rules.

Now, here the averment is, that the note when due was presented, not to the maker, but to the payee, Ward, which I suppose is a mistake, for if the plaintiff relied upon the fact of the maker Gardiner being only a party to the note for the accommodation of these defendants, and that a presentment to him was therefore unnecessary, he could have omitted to aver presentment to any one, for Ward, it appears, had no more value for indorsing the note than Gardiner had for making it.

But without starting any new difficulty on this account, we see no reason why the plaintiff should not receive the benefit of his verdict.

These defendants, for whose accommodation alone the security was created, cannot be injured by the plaintiff having discharged Gardiner, against whom they, at any rate; according to the case proved, could have had no recourse.

The plaintiff's obtaining a partial payment from Gardiner, the accommodation maker, which was his inducement for discharging him, was, so far as it went, a benefit conferred on these defendants, who must otherwise have paid the whole to the plaintiff, and the discharge of Gardiner has deprived them of no advantage.

Per Cur .- Postea to Plaintiff.

HAMILTON V. SHEARS ET AL.

In an action upon a bail-bond, given in a district court, the plaintiff—if the plaintiff in the original action—should sue in the district court; and if he sues in the Court of Queen's Bench, the defendant may take advantage of the error, in one of three ways—either by applying to the court to set aside the proceedings—or by pleading in abatement to the jurisdiction—or by demurring generally to the declaration—he cannot have a repleader.

Semble, that the sheriff, if suing on the bond, is not restricted to the district court of the district in which the bond was taken, but may sue in the Court of Queen's Bench.

Where the record pleaded is of another court, the practice is to take out a rule appointing a day to being in the record into this court—otherwise where the record pleaded, is of the same court, there a mere notice will be sufficient.

This was an action on a bail-bond, given in the District Court, in a cause of Lyman v. Stafford.

Verdict for the plaintiff, £19 17s. 2d.

The defendant craved over, and set out the bond, which was in a penalty of £28 r6s. 4d. with a condition for the appearance of one Stafford, in the London District Court, to answer to Lyman in a plea of trespass on the case on promise.

Pleas: 1st, non est factum.

2ndly: That Stafford put in bail to the action, setting forth the recognizance, and concluding with a verification by the record remaining in the District Courts.

Replication: that there was no such record remaining in the District Court, whereupon a day was given in this court for producing the record.

Nil dicit as to the other defendants.

Verdict for the plaintiff on the issue, and damage's assessed at £19 17s. 10d.

A rule nisi was granted to set aside the verdict, and to grant a repleader—the trial of the second issue being, by the plaintiff's pleading, excluded from the jury, contrary to law—or why the judgment should not be arrested.

On motion of plaintiff, Monday, 19th June, was appointed in this court

for the defendant to produce the record pleaded by him.

On that day the plaintiff's counsel, (Wilson, of London,) prayed the judgment of this court in his favour, on the plea nul tiel record. He shewed cause also against the rule nisi, which the defendant did not support then, or during the term.

ROBINSON, C. J., delivered the judgment of the court.

The action might, for all that appears, have been brought in the District Court, and ought to have been brought there, if it had been the plaintiff in the original action, that was suing as assignee of the bond.

But the sheriff is not restricted to the court in which the bond was taken, and if he had been, still it has been held, that where the objection does apply, as in the case of assignees, advantage can only be taken of it by applying to the court to set aside the proceedings; or the defendant might have pleaded to the jurisdiction in abatement; or demurred generally to the declaration.

The issue in this case appears to have been properly found—the record of recognizance averred, is the record of an inferior court of record—and is to be verified by this court on inspection of the record removed by certiorari.

The plaintiff is entitled to judgment of failure of record, and is at liberty, without any order being made, to enter judgment; the rule appointing a day to bring in the record is regular, being required by the practice where the record pleaded is of another court; otherwise, when it is of the same court, for there a mere notice would be sufficient.

The rule nisi for a repleader should be discharged.

Per Cur.—Rule discharged.

LAKE V. BRILEY.

Where to an action of trespass quare clausum fregit—the defendant pleaded "that the close was not the close of the plaintiff"—and the plaintiff had a verdict for 1s. damages; Held, per Cur., that the plaintiff—under the stat. 22 Car. II. ch. 9—though he had not obtained from the judge at the trial a certificate that the title to the land came in question—was, nevertheless, entitled to full costs.

Trespass quare clausum fregit, in a single count.

Pleas:

ist: not guilty.

andly: the close not the plaintiff's.

3rdly: plaintiff not possessed of the close in manner and form, &c.

Issues on all the pleas.

Verdict for the plaintiff; 15. damages.

The master had thereupon entered judgment, taxing for the plaintiff only 1s. costs, on the assumption that the 22nd Car. II. ch. 9, gave him no more costs than damages,

McKenzie, of Kingston, for the plaintiff, moved to revise taxation—contending that although he had obtained no certificate that the title to land came in question, yet that he was entitled to full costs, because the issues upon the record necessarily put the title in question; he cited 9 Price, 314; 3 M. & W. 288, 458; 12 Law Jour. N. S. 318.

Smith, of Kingston, Q. C., shewed cause; he cited Chitty's Arch. vol. 1, 244; 12 L. J. N. S. 318; 2 Bing. N. C. 98; 1 P. & D. 98; 8 A. & E. 872; 7 C. & P. 591; 12 A. & E. 624; 6 M. & W. 145; 8 Dowl. 203; 12 M. & W. 142; 6 Tyr. 4; 6 M. & W. 513.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that this rule must be made absolute, for the plaintiff was entitled to tax full costs upon the face of the record, there being a plea which expressly, and in terms, put his title in issue.

The cases of Powell v. Young, 3 M. & W. 288, and of Pugh v. Roberts, ibid. 458, are clear to that effect; and the case of Whittington v. Box, 5 Q. B. R. 139, though it exhibits a difference of opinion between the Courts of Queen's Bench and Exchequer, as to what is put in issue by the plea referred to in them, does not shew any disagreement between the two courts upon the effect of the plea in entitling a plaintiff to costs without a certificate. On the contrary, it was correctly said in the argument of this case, the Queen's Bench expressed their concurrence with the Court of Exchequer on that point.

The plea that the close was not the plaintiff's, rested the defence directly and certainly upon the question of title, and it cannot be supposed that parliament intended to deprive plaintiffs of costs in actions brought to vindicate their rights.

It may indeed be said, that though the defendant has pleaded that plea, yet till the trial, it cannot be known whether he is in earnest in calling in question the plaintiff's title. He may not put him to the proof—still the plea does necessarily throw proof of title upon him, unless the defendant abandons the defence at the trial, and therefore the plaintiff must come prepared to shew at least his right to the possession.

So indeed he must have done before, under the plea of the general issue, and yet there he required a certificate. The difference is, between a plea which may have been pleaded with a view to a mere denial of the injurious act, and without any intention of disputing the plaintiff's title, and a plea which cannot have been pleaded for any other purpose.

An inferior court might have tried the cause upon the one plea, but could not upon the other; and this in the case of Littlewood v. Wilkinson, 9 Price, 314, is said to be the criterion.

It would seem to be the reasonable effect to give to the 22 Car. II. chap. 9, that wherever the freehold or title of the land may come in question upon the defendant's plea, there the plaintiffs should tax full costs without a certificate; for the plaintiff cannot tell before the trial that the defendant will not insist upon whatever defence his plea opens to him, and therefore, if after the plaintiff has prepared himself with evidence, and with the assistance of counsel to support his title, this should be rendered unnecessary by the defendant not in fact questioning his title at the trial, it would be hard that he should lose his costs, because the judge could not certify that the title of the land was chiefly

in question, and yet this hardship might have occurred before the new rules, when the general issue only was pleaded.

It was pressed upon the court in Littlewood v. Wilkinson, that the statute 22 Car. II. chap. 9, by its express words requires a certificate in all such actions that the title was chiefly in question on the trial, and this without reference to what the defendant merely affects to dispute by his plea; but the court held a certificate unnecessary there, "because upon the record the freehold might necessarily have come in question." I confess I do not clearly apprehend what "might necessarily have come in question" means, though "must necessarily have come in question" would be perfectly intelligible.

The court in Peddle v. Kiddell, 7 T. R. 659, admit that the statute had received an application not easy to be reconciled with the language of it; but we must follow the train of decisions which have established a settled practice under the statute, and doing so, we are bound to hold that a defendant, by pleading that "the locus in quo is not the plaintiff's close," entitles the plaintiff, if he succeeds, to tax full costs, without obtaining a certificate. This should make defendants cautious not to place such a plea on the record, when there is really no ground for it.

Per Cur.—Rule discharged.

LAND ET AL. V. MALDEN.

The master of a vessel has no claim or right against the owners, to detain the ship or freight for wages, or any disbursements made by him on account of the ship.

One Bradbury, resident in Montreal, was the owner of a schooner called the Jesse Wood; and on the 19th of May, 1847, he sold her to these plaintiffs, making an assignment to them by bill of sale.

The defendant was then master of the schooner, which was navigating the waters of Lake Ontario, and had made two or three voyages that season before the assignment.

At the time of the transfer to these plaintiffs, the Jesse Wood was at St. Catherines, and a few days after the transfer, she took in a cargo of flour there, which was delivered to the consignees at Kingston, and the master received from them the amount of freight.

The plaintiffs brought this action against the master, to recover the money thus paid to bim, as held by him to their use.

The defendant pleaded payment to the plaintiffs, and a set off, for money lent to the plaintiffs, for work and labour done for them, and for money due upon an account stated.

He and the seamen had been paid by the plaintiffs their wages from the time of the assignment; but the defendant claimed a right to retain for monies paid by him to his men, and for necessaries found for the vessel before the transfer, and while she was the property of Bradbury.

It was not very clear upon the evidence, at what time the defendant first was made aware that the vessel had changed owners. He might have known of it before he shipped the flour, and there was some evi-

dence to that effect, but it was far from being clear. The impression of the learned judge was, that he did not know of the assignment till he arrived at Kingston with his cargo.

He claimed there a right to detain the vessel till he was settled with for all charges anterior to the assignment; but he did not persevere in that, though he refused to pay over the freight he had received in this last voyage, without deducting the charges above mentioned.

Verdict for the plaintiff.

McKenzie, of Kingston, moved for a new trial on the law and evidence, and for misdirection.

Smith, of Kingston, Q. C., shewed cause; no cases cited. The points taken fully appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

I did not consider at the trial, that the defendant could hold the plaintiffs accountable for any disbursements made by him on account of the vessel, while she was the property of his employer, the former owner; and if he could do so, still it seemed clear to me, that he ought to have pleaded such a plea as would have admitted such claim, either upon the principle of lien, or retainer; for it clearly could not come under the plea of payment, or set-off, because those were confined to transactions between himself and those plaintiffs.

Upon looking into the question, however, it is quite evident that upon the broader grounds, the verdict was right, and that I was bound to reject, as I did, all evidence of charges for wages paid or supplies furnished by the defendant before the vessel became the property of these plaintiffs.

The cases of Wilkins et al. v. Carmichael, I Doug. IoI; Hussey v. Christie, 9 E. R. 426; and of Smith et al. v. Plummer et al, I B. & Al. 575, are conclusive authorities against any such right as that claimed by the master, the defendant in this cause, to detain monies received for freight in order to reimburse himself for wages or other disbursements made by him on account of the ship, even during the same voyage.

In the case last cited, Bayley, J. observed, the "master is the servant "of the owners, and it is in his power, in order to protect himself against "any loss for non-payment of wages, or for advances made by him abroad, to make a specific bargain with them, and to require security for its performance."

"He has no lien on the ship, either for repairs, wages, or advances." If therefore he has none on the ship, he can have none on the cargo, "for they must stand upon the same footing, and if any hardship arise "to the master from this, it is owing to his having made an imperfect bargain with his owners."

In the same case, Abbot, J. says, "It has been already decided, that "the master has no lien on the ship for wages, or other disbursements, "and these decisions seem to lead to the conclusion that he has no "lien on the freight, for the right to receive the earnings of the ship "must follow the right to the ship itself." Mr. Justice Hotroyd remarked, "he has no lien on the body of the ship, in respect of wages "or money expended for stores or repairs, and the lien on the freight "must stand on the same ground."

These decisions establish, that this defendant could not have detained the freight on any such ground as he has advanced, even against the former owner, who employed him, and even if his disbursements had been incurred in the prosecutions of a foreign voyage. No idea of such a lien ever existed with regard to advances made for a vessel engaged in domestic trade.

It need not be said, that the cases cited do not touch the right of hypothecation by the master in certain cases; nor the right of lien in other persons than the master, for repairs done or advances made. The master is regarded as the mere servant of the owners; his contract is a purely personal one, and he is the very person emphatically who can not claim a right against his owners to detain the ship or freight for any debt due to him.

Per Cur.-Rule discharged.

COURTNEY V. SINCLAIR.

The plaintiff declared in covenant against the defendant—for that the defendant covenanted that he would pay to the plaintiff the sum of money in the proviso of the indenture mentioned, upon the day and time appointed for payment thereof, in and by the said proviso.—Breach: that the defendant did not, nor would, pay to the plaintiff the sum of £34 15s, and interest for the same on the day and time appointed for payment thereof, as aforesaid, but therein failed and made default, &c.

Demurrer to declaration (as below)—Held per Cur., declaration good.

Covenant. On the 4th of August, 1846, the defendant covenanted, that he would pay to the plaintiff £34 15s. od., on the 1st of January then next, with interest; and the plaintiff complained that the defendant would not pay the money on the day appointed, but therein wholly failed and made default contrary to his covenant.

Demurrer: that it was recited and alleged in the said declaration, that the said defendant by the said indenture, did for himself, his heirs, executors, and administrators, covenant, promise and agree to and with the plaintiff, his heirs, and assigns, that he the defendant, his heirs, executors, administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the said plaintiff, his heirs, executors, administrators or assigns, the said sum of money in the proviso or said indenture mentioned, with interest for the same, as aforesaid, upon the day and time mentioned and appointed for payment thereof, in and by the said proviso, according to the true intent and meaning of the said indenture.-While it was not stated in, nor did it appear from, the declaration, what was the time and manner so appointed by the said proviso-or that any time or manner was so therein before appointed-or where-or how the said sum was to be paid according to the true intent and meaning of the said indenture-or whether the time for payment thereof pursuant to the said covenant had elapsed before or at the time of the commencement of this suit-or was yet elapsed-and that it was altogether uncertain where or how according to the said covenant as set forth in the said declaration the money was to be paid-that the breach assigned by the plaintiff was too narrow, and was informal in this, that the plaintiff alleged as a breach of the said covenant, that the

defendant did not nor would well and truly pay, or cause to be paid unto the plaintiff, the said sum of thirty-four pounds, fifteen shillings, and lawful interest for the same, on the day and time mentioned and appointed for payment thereof, as aforesaid, but did not state the day nor the time when that sum was to be paid whether before the commencement of this suit or otherwise, nor did it state that the said sum of thirty-four pounds, fifteen shillings, and interest thereon, was not paid to the plaintiff before the commencement of this suit, or that the said sum and interest thereon or any part thereof was still due and unpaid before the commencement of this suit, nor did it state the amount due and owing from the said defendant to the said plaintiff for or on account of the said sum of thirty-four pounds, fifteen shillings, and interest thereon, or whether any and what amount was still due and unpaid thereon.

Richards, for the demurrer, cited 2 M. & G. 329; 3 U. C. R. 148; 2 Ch. Pl. 314.

D. B. Read, contra, cited 2 Ch. Pl. 31; 5 Dowl. 325; 2 U. C. R. 426. Robinson, C. J., delivered the judgment of the court.

The defendant's demurrer is wholly without ground. The pleadings shew that the declaration was filed on the 24th of April, 1848, which is long after the day when the money was to be paid, and we have no intimaation on the record of any previous proceeding, nothing to shew that the action was brought before the 24th of April.

The right of action of course accrued on the 1st of January, 1847, if the mortgage money was not then paid, and even if all was paid afterwards, there was still a breach in not paying at the day.

Per Cur. - Judgment for the plaintiff on demurrer.

McDonald v. Snitsinger.

Where by the terms of a bond, the obligor was to convey in fee simple to the obligee—at the expense of the obligee; Held per Cur., that on this condition, it was incumbent on the obligor to prepare the deed, and to tender the delivery of it to the obligee on his paying the expenses thereon-and therefore-that a plea by the obligor to such a bond-that the obligee did not prepare or tender the deed or expenses—was bad.

Debt on bond-conditioned that if the defendant (the "within three years from the date of the bond, should convey or cause "to be conveyed, a good and valid deed in fee simple in law, to the said "plaintiff (the obligee), at the expense of the plaintiff, then, &c."

Plea: that the plaintiff did not prepare a deed, or tender expenses.

Demurrer to plea: that by the terms of the condition, the preparing and tendering of the deed by the plaintiff to the defendant, was not a condition precedent to the execution by the defendant.

Richards, for the demurrer, cited 12 Mod. 401; 5 Coke, 226; Cro.

Eliz. 517; 2 Ld. Rayd. 250; 4 U. C. R. 204.

P. M. Vankoughnet, contra, 1 Saund. 320; Sug. Vend. 248; 5 E.
R. 198; Com. Bac. Abr. 2 H. Bl. 123. ROBINSON, C. J., delivered the judgment of the court.

We think on this condition it was incumbent on the obligor to prepare the deed, or rather that it was not incumbent on the obligee to do so, which is the defence on which the plea rests.

The obligor was to take his first step. It was to be peculiarly within his knowledge, whether he had or had not got his right to land acknowledged by the government, before the day when he was to convey. What land he should obtain, would depend upon himself and the government. If the government should grant him none, or if the plaintiff should never learn what they had granted him, he could prepare no deed.

The defendant, if he procured a grant of certain land, could have made a conveyance of it to the plaintiff, and then gone forward and offered to deliver it, on being paid his expenses, which would include the charge of the conveyance and any attendant expenses; and then if the plaintiff had refused to pay these charges, the defendant would have stood acquitted, because by the condition the conveyance is to be made at the expense of the obligee.

The plaintiff is, in our opinion, entitled to judgment. Per Cur.—Judgment for plaintiff on demurrer.

AINSLIE V. CHAPMAN.

Penalty—liquidated damages—Where the plaintiff in an action of debt on an agreement, lays his breach in such a manner as to make it uncertain whether he is not claiming his damages in the shape of liquidated damages, by reason of a failure in some very minute particular of agreement—as if for instance, the breach complained of was, that the defendant did not by the 1st of September, clear off all the standing timber; nor did he fence the said land, the court will not look upon the sum mentioned in the agreement, as anything but a penalty—though the parties may have agreed to call it liquidated damages—and semble even though the parties have in terms agreed that the sum named should be regarded as liquidated damages, and not as a penalty.

dated damages, and not as a penalty.

When a certain sum is claimed by way of liquidated damages in an action of debt, for the non-performance of an agreement—and the court are of opinion that the sum mentioned in the agreement is in the nature of a penalty, and not of liquidated damages; *Held per Cur., that the statute 8 & 9 Will. III. ch. II, will, when such an opinion is pronounced by the court, restrict the plaintiff from recovering more damages than he has received by reason of the breach—and that a demurrer therefore to the declaration, would be bad.

Debt—on agreement—that the defendant would clear, burn off or remove, all the standing and fallen timber, brush, logs, rubbish, off a certain piece of land, in such a manner as that it should be in a good condition to be sown; that he would do this by a certain day; and also that he would fence the land with a rail fence of a certain height, staked and sufficiently laid to keep out hogs, or other animals—And that if default should be made in draining and fencing the said land in manner aforesaid by the day mentioned, he should on the next day pay to the plaintiff the sum of £100, as damages liquidated and ascertained.

Breach: that the said defendant did not by or before the said first day of September, in the year of our Lord one thousand eight hundred and forty-seven, well and sufficiently clear, burn off, or remove, or cause to be well and sufficiently cleared, burned off, or removed, all the standing and fallen timber, brush, logs, and rubbish, being on the said land; nor did he the said defendant fence or cause to be fenced the said land; nor did he pay or cause to be paid the said sum of one hundred pounds, of lawful money, as damages liquidated, as aforesaid, according to the

form and effect of the said articles of agreement, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of one hundred pounds.

Demurrer: that the said damages were not in law liquidated damages, as they were made payable from the non-performance of several acts, some of which were trifling in their nature, such as finishing strips of boards, and cutting the tops of the posts of the fence therein mentioned, cutting ten cords of cord wood and splitting rails at six dollars and a quarter per thousand, which was a reasonable remuneration.

Freeman, of Hamilton, for this demurrer, cited 6 Bing. 141; 1 Saund. 58, C.; 6 B. & C. 216; 6 Bing. 141; 2 Bing. N. C. 390; 7 M. & W. 678.

Crooks, contra, relied upon 4 Bur. 2225; Holt's Rep. 43; 2 T. R. 32; 1 Bing. 302; 3 M. & W. 545.

ROBINSON, C. J., delivered the judgment of the court.

The froo sued for in this action is clearly, we think, to be regarded, as the law is now settled, as a penalty, and not as a sum to be certainly recovered as stipulated damages for any breach of agreement.

The defendant engaged that he would clear, burn off or remove, all the standing and fallen timber, brush, logs and rubbish, off a certain piece of land, in such a manner as that it should be in a good condition to be sown; that he would do this by a certain day; and also that he would fence the land with a rail fence of a certain height, staked and sufficiently laid to keep out hogs or other animals. And then he agrees that if default shall be made in clearing and fencing the said land in manner aforesaid, by the day mentioned, he should on the next day pay to the said Adam Ainslie, the sum of £100 as damages liquidated and ascertained.

The plaintiff lays his breach in such a manner, as to leave it uncertain whether he is not claiming the £100 in the shape of liquidated damages, by reason of a failure in some very minute particular, for the charge is that the defendant did not by the 1st of September clear off all the standing and fallen timber, brush, logs, rubbish; nor did he fence the said land; so that if a single log, or a load of rubbish were left lying on the land, or one panel of the fence not raised to the specified height, the defendant must be found to have committed the breach assigned.

We cannot in such a case look upon the from mentioned in the agreement, as anything but a penalty, though the parties have agreed to call it liquidated damages.

The cases of Davis v. Penton, 9 D. & R. 369; Boys v. Ancell, 5. Bing. N. C. 394; and of Horner v. Flintoff, 9 M. & W. 678, shew that this would be the construction put upon it in such a case in all the courts of Westminster Hall. Kemble v. Farren, 6 Bing. 141, is even a stronger case, for there the parties had in terms agreed that the sum named should be regarded as liquidated damages, and not as a penalty, and yet the court treated it as a penalty.

But the plaintiff in this case has brought debt, claiming the £100, and it must follow that the court treating it as a penalty, must allow the party upon this record, the benefit of the statute 8 & 9 Will. III. ch. 11, which is not confined to the case of bonds with penalties, but extends also to actions brought in any penal sum for non-performance "of any

covenant or agreement in any deed or writing contained;" and the effect of the proceeding which must take place under the statute, is to restrict the party to the recovery of such damages as he had received by reason of the breach.

What is said by Holroyd, J., and Littledale, J., in Davis v. Penton, points to this; and the subject is clearly treated in a note to the case of Barton v. Glover, Holt's Reports, 43.

Dage v. Brand, 2 Wils. 377, is in fact this very case, and shews that this declaration furnishes no ground for demurring.

The plaintiff sues in debt for a sum certain, but though he may intend to claim the whole, the statute (when the court pronounces it to be in fact a penalty, and not liquidated damages), limits the plaintiff's claim to the damage he has actually suffered.

The declaration is in effect the same as in any action of debt on bond, for the performance of covenants, and affords no more ground for a demurrer.

Per Cur.-Judgment for plaintiff on demurrer.

KING'S COLLEGE V. M'DOUGALL,

The principle that the later items of an account draw the others after them, and thus save all from the operation of the Statute of Limitations, does not apply—where quarterly payments (e.g. for rent or tuition), are made and received as for a late specific and independent quarter, due at the time of payment, unmixed with items for any earlier quarter. The presumption in such a case is—unless the contrary be shewn to be the fact—that the earlier quarters have been all paid and satisfied.

The plaintiffs sued in indebitatus assumpsit, to recover monies claimed as due for tuition for the defendant's son. In their bill of particulars they claimed for half a quarter, ending 20th December, 1838, and for the first second, third, and fourth quarters of 1839; for the first and second quarters of 1840; for the fourth quarter of 1842; and for the first quarter of 1843; in all £60 4s. 9d. They admitted cash paid at different times amounting in all to £44 9s. 11d., and claimed a balance of £15 14s. 10d.

The defendant pleaded, 1st, non-assumpsit.

andly, the Statute of Limitations. Issue thereon.

Verdict for the defendant, with liberty for plaintiff to move to enter a verdict for the plaintiff for £22, in case the court should be of opinion that the plaintiff should have recovered upon the evidence.

Eccles, for the plaintiff, cited 5 Bing. N. C. 455; 2 C. M. & R. 45; 6 Taunt. 597.

Galt, for the defendant.

The argument appears in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

We think nothing can be clearer than that this case does not come within the principle on which Catling v. Skoulding was decided, 6 T. R. 189; or any other case in which a demand has been admitted to be taken out of the Statute of Limitations, on the ground of a credit being given within six years, or upon an account still current and open between the parties.

The plaintiff's books, when produced upon the trial, shewed that a number of small distinct accounts for different quarters had been paid by the defendant, and for all that appears, duly paid when rendered. These sums paid, were evidently given and received in discharge of certain quarterly accounts, unmixed with other items, and the several payments were, by the nature of each transaction, appropriated to the discharge of each quarterly account respectively, in respect of which the money was claimed.

There was no discretion in the plaintiffs, to shift payments made clearly in discharge of each of these independent quarterly accounts, as they were presented, to apply them to the discharge of other quarterly accounts alleged to be due.

The presumption would be, as in case of demands for rent, that the settlement of each specific quarter discharged all accounts for tuition up to that time; for it would seem an unusual and unlikely thing, that the plaintiffs would be receiving payment for later quarters, leaving the prior quarters unsatisfied.

There might be circumstances that would explain it, and shew that from some cause there were in fact some of the earlier quarters yet standing open and unsettled; but in the absence of any such evidence, it should be presumed when each quarter was paid that all was settled up to that time.

There is no plea of payment on the record, but the defendant avails himself of the Statute of Limitations, and denies the liability for any of these quarters for which the plaintiffs now seek to charge him, inasmuch as all are beyond six years, those within that time appearing by the plaintiff's own books to have been all satisfied.

The plaintiffs meet this defence by claiming to have it considered that they have an open unsettled account with the defendant from the beginning, upon which there are credits given in their own books for payments made within six years; that this entitles them to treat the whole as an open unsettled account, on the principle that the later items draw the others after them, and that all is thus saved from the operation of the statute. But such an application has never been attempted to be made of the case of Catling v. Skoulding, and the effect would be most unreasonable—if the plaintiffs having received in 1843, for example, a certain sum in discharge of a quarter's tuition of that year, agreeing to a penny with the amount of the account then rendered, could silently transfer it to the payment of an account claimed by them to be still due for 1839, and thus deprive the defendant of the protection which the Statute of Limitations was intended to afford against stale demands.

We consider that the Statute of Limitations is, upon the evidence, a defence against any claim in this case of more than six years' standing.

Per Cur,-Rule discharged.

SUTHERLAND ET AL. V. MCCASKILL.

Where a plaintiff charged the defendant as upon a guarantee, to pay a certain judgment which he set out in specific terms; and he afterwards proved at the trial—not this special guarantee—but a guarantee extending to all claims—and he was non-suited for a variance. Held, per Cur., non-suit right.

Semble, however, that if the plaintiff had set out the guarantee as it really was, and had then averred the claim under the judgment, he would have shewn a claim applicable to the guarantee, and sustained his action.

Action on a guarantee.

Plea: general issue.

The plaintiff was non-suited for a variance,—the particulars of which appear in the judgment.

Duggan moved to set aside the non-suit.

ROBINSON, C. J., delivered the judgment of the court.

There can be nothing clearer, than that the plaintiff has set out upon the record a guarantee wholly different from that which has been proved.

The guarantee is in the most general terms possible, extending to all claims of the plaintiff and his brother, upon Alexander and Kenneth McCaskill jointly, or on either of them severally.

It is true that the guarantee in those terms, is applicable to such a claim as the plaintiff has avowed; that is, a judgment entered of record in favour of the plaintiff and his brother, against Alexander McCaskill; and if the plaintiff had truly set out the guarantee as it is, and then averred this claim under the judgment, he would have shewn a claim which was applicable to it; but instead of that, he takes upon himself to assert what he could not substantiate, and avers in direct terms, that the defendant undertook to pay a certain judgment, which is set out in specific terms, as if the defendant had really recognized this particular judgment, and undertaken to pay it. His guarantee, when produced, was not as he had set it out, and he was necessarily non-suited.

Per Cur.-Rule refused.

DEMPSEY V. WINSTANLEY.

A defendant—sued by an attorney for his fees—is entitled, one month before action brought, to have a copy of the bill signed, &c., according to the statute-even though he may have explicitly admitted the amount of the bill to be due. Where therefore to a declaration by an attorney for his fees, containing a count upon the account stated, the defendant pleaded, no bill delivered, &c., and the plaintiff demurred; Held, per Cur., plea good.

Declaration on the common counts for services, &c., as an attorneymoney paid, and account stated.

Plea to the declaration: that all the counts apply to services, &c., as an attorney; and that no bill was delivered by the attorney one month before action in manner and form as the statute required.

Demurrer: that the plea of no bill delivered, was no plea to the count on the account stated, even though the account may have been stated as monies due for fees and services rendered by the plaintiff to the defendant as an attorney.

Eccles for the demurrer.

R. P. Crooks, contra.—(No cases cited.)

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff's counsel, on the argument, abandoned any special ground of demurrer, and confined himself to the substantial exception, that the plea of no bill delivered, is no plea to the count on the account stated, even where the account may have been stated as of monies due for fees and services rendered by the plaintiff as an attorney.

As to that, I apprehend that the defendant was entitled, under the statute, to have a copy of the bill, though he may have acquiesced in the amount; I Moo. & Rob. 359; I Camp. 437; IO Jurist, 945; II Jurist, 284.

The Courts in England have treated the provision of the statute as imperative, and entitling the defendant to a copy of the bill before action brought, even where he has explicitly admitted the amount to be due.

In Crowder v. Shee, I Camp. 437, the defendant examined the items of a bill which were shewn and explained to him, and directed a cheque to be filled up for the money; but that was held not to dispense with the necessity for delivering a signed bill according to the statute, before commencing an action.

Per Cur.—Judgment for the defendant on the demurrer.

SCULTHOPE V. BATES ET AL.

Where—upon the question of a partnership between father and son (defendants)—the jury found for the plaintiff upon the following evidence:—that the son, a young unmarried man, lived with his father—was in general occupied with his business, carrying beer to his customers, receiving money, and making payments for him, &c.—and had furnished part of the money on which his father built his brewery; Held per Cur., that this evidence laid no ground upon which a partnership between father and son could be inferred—and that the defendants were entitled to a new trial on payment of costs. Assumpsit on the common counts.

Plea: general issue, set-off, and payment of part by an accepted order on one Mosely.

Issue thereon.

The case turned at the trial on the denial of any joint liability of defendants, father and son,

That point was left to the jury on the evidence, which sufficiently appears in the judgment of the court.

Verdict for the plaintiff, £50 is. 8d.

Galt moved for a new trial on the evidence.

Richards shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This was a question of fact entirely for the consideration of the jury, whether the defendants were partners or not; or whether there was satisfactory evidence to prove them liable as joint contractors.

I thought the fact of joint liability on any ground, was not by any means conclusively made out, and so I stated to the jury. The mere fact of the son, who was a young man unmarried, living with his father, and being in general occupied in his business, carrying beer to customers, receiving money and making payments for him, ought not I think to be received as evidence to charge him as a partner. This is a state of things we so commonly find existing between father and son, where there is really no idea of a partnership, and no good ground for holding the son liable, that we cannot but feel how dangerous it might be in some cases, to draw the inference from such premises.

The only specific fact on which stress seemed to be laid was, that of

the son having furnished part of the money for buying the ground on which the father built the brewery; but that was really no evidence of a partnership in business.

And on the other side, the conduct of this plaintiff in his transactions with the father, Richard Bates, went far to show that he considered himself to be dealing with him alone.

If the verdict were less considerable, we should be disposed to leave it undisturbed, though it is against the weight of evidence; especially as the probability may be, that the father, who is undoubtedly liable, would take care that his son was not in fact injured by the verdict; but for the sake of the principle, and from a regard to the many cases there may be, where great injustice would be done by inferring a partnership between father and son on no other grounds than were laid in this case, there should, we think, be a new trial on payment of costs, if the defendants desire it on those terms.

The defendants have both on oath explicitly denied the partnership, which is only of consequence as excluding any unfavourable inference that might have been drawn from their failing to do so.

Per Cur.—Rule absolute, on payment of costs.

DOE DEM. SHERWOOD v. ROE.

The affidavit of service of a declaration in ejectment, and notice upon the tenant, must shew the time when the declaration, &c., was served.

In this case, Crawford moved for a rule for judgment nisi, against the casual ejector.

Notice was addressed to John Prior, and Michael McCarthy,

The declaration entitled Michaelmas Term, 11 Vic. Premises, in the District of Johnstown.

Notice to appear in next Hilary Term.

The bailiff swore that he served John Prior, tenant in possession, &c., (did not say when he served him); and that he explained to him the meaning of the said declaration, notice, and service.

Robinson, C. J., delivered the judgment of the court.

It is impossible that we can grant a rule nisi for judgment, upon an affidavit which does not shew the time when the declaration was served.

We need not therefore consider whether the plaintiff, on a sufficient affidavit, could now have obtained his rule.

Per Cur.-Rule nisi refused.

HOGG v. MARSH,

Held per Cur., that the follwing instrument — "Yonge Street, 29th April, "1839. Seventeen months after date, I promise to pay to Mr. James Hogg, "or order, the sum of £50, without interest; or three years and five "months after date, with two years' interest, for vaule received," is a valid promissory note.

Declaration-indorser against the maker of a promissory note.

The instrument declared on as a promissory note was special, and in these words:

"Yonge Street, 29th April, 1839. Seventeen months after date, I "promise to pay to James Hogg, or order, the sum of £50, without "interest: or, three years and five months after date, with two years' interest, for value received,"

Demurrer: that the plaintiff had declared on a promissory note, whereas the instrument set out was not a promissory note, but a special agreement for the payment of interest.

Gamble for the demurrer, referred to Bayley on Bills, 2 Camp. 205.

Duggan contra, cited 5 B. & C. 560; Str. 1217; I Burr. 226; 7 Jurist 1115; Story on Notes, page 30.

ROBINSON, C. J., delivered the judgment of the court.

Upon the argument, I was inclined strongly to think, that the instrument sued on here could not be treated as a promissory note, being in a degree uncertain as to the time of payment, and clogged with a kind of condition or alternative, which the policy of the law seems to prohibit, for the convenience of commerce in the case of those securities intended to be negotiable. It seems at least no better than a promise to pay in seventeen months, or in three years and five months; but on consideration, I think we could not hold such an undertaking to be not a promissory note; and could not hold that this is not.

It is a positive engagement to pay a certain sum of money, at the latest by a certain day, and so far as regards that latest day, there is no uncertainty or doubtful contingency.

The case nearest to it, that I have found, is an American decision, cited by Mr. Justice Story, in which a promise to pay a sum of money on a day named, or when a certain contract should be completed, if that should first happen, was held to be a valid note.

The case of Blake v. Lawrence, 4 Esp. C. 147, is not very unlike. This note is not payable eventually upon any uncertain contingency.

In Colehan v. Cooke, Willes, 396, it is remarked by the Chief Justice, that the statute 3 & 4 Anne, ch. 9, which puts promissory notes on their present footing, is silent as to the time of payment, and gives no particular form. In the elaborate judgment in that case, the question is very fully discussed, and the whole tendency of it is to show this to be a promissory note.—7 Jurist, 1115; 1 Br. & Bing. 447.

Per Cur.—Judgment for the plaintiff on demurrer.

COMMERCIAL BANK V. KERR AND CRAIG.

A note for £25, was made and endorsed at Perth in the Bathurst District—but was discounted at Brockville, in the Johnstown District, by the agent of the plaintiffs, the endorsers. The plaintiffs sued the defendants (the maker and endorser) in the Queen's Bench, laying the venue in the Johnstown District. Judgment by default, and an order to compute was obtained. Held per Cur., that under these circumstances the plaintiffs were entitled to Queen's Bench costs,

This was an application to the court, at the suggestion of Mr. Justice Jones, from the Practice Court.

A note was discounted at Brockville, by the agent of the Commercial Bank there. It was made payable at Brockville, but was made and endorsed by these defendants respectively at Perth, where the note was dated, and where the defendants were living.

The plaintiffs sued as indorsees. The note was for £25.

There were other endorsers on the note. The venue was laid in the District of Johnstown.

The other defendants did not reside in the District of Bathurst; and not having been served, the plaintiffs dropped proceedings against them, and continued the suit against these defendants only.

Judgment by default, and order to compute obtained.

The question was, whether upon these facts, there was cause for bringing the action in the District of Johnstown, so as to entitle the plaintiff to an order for Queen's Bench costs.

ROBINSON, C. J., intimated that the court considered it would be in accordance with the principles on which the judges had usually acted, that a certificate should, under the circumstances of the case, have been granted, if the cause had been tried on an issue, and therefore that an order should be made for full costs under our rule of court, as in other cases where there has not been a trial.

DOE DEM. NOTMAN V. McDONALD.

Where land is so particularly described in a deed by its local abutments, as to enable any one to find it with certainty—it is unnecessary further to state in what lot in the township the land lies. If therefore the land so described is stated to be part of *lot* 42—when it is in reality part of *lot* 45—the deed is nevertheless sufficiently certain and good.

Ejectment for part of lot No. 45, in the 2nd concession of the township of Ancaster, being in the village of Ancaster, and described in the consent rule.

The land was purchased at sheriff's sale, on a fi. fa. against the lands of John Second. The deed was dated the 22nd June, 1832.

The defendant, Secord, was in possession when the land was sold and the sheriff's deed executed.

On the 10th December, 1822, John Secord mortgaged this village lot, and other lands in Ancaster, to Messrs. Maitland, Garden and Auldjo, for a term of one thousand years, to secure a large debt; but in describing this lot in Ancaster, this mortgage first gives the correct local abutments as of a village lot in Ancaster thus: "commencing on the north-east "angle of Samuel Andrews' lot in the village of Ancaster, thence north 60 deg., west 4 chains; thence north 22 deg., east 2 chains, 50 links; thence "south 68 deg., east 1 chain; thence south 22 deg., west 2 chains, 50 links "to the place of beginning;" and then calls it erroneously part of lot 42, in the 2nd concession of Ancaster, when it is in fact part of lot 45, in that concession.

It was reserved as a question, whether that mortgage carried the title to the village lot notwithstanding that error. If it did, the term under it, vested in the mortgagees, and Secord had only a reversion which could pass under the sheriff's deed.

H. J. Boulton, Jur., moved to have a verdict entered for the defendant, or for a new trial on the merits, and cited Dyer, 292; 5 B. & Ad. 52.

R. P. Crooks shewed cause, and cited 3 Camp. 426; 5 B. & C. 108; 2 Atk. 384; 4 Br. C. C. 515; 6 Ves. 334.

Robinson, C. J., delivered the judgment of the court.

Taking up this case on the only point on which it was argued, there can be no doubt that the defendant is entitled to the postea.

The land is so described in the mortgage, as to enable any one to point out with certainty on the ground the premises intended to pass; and that being so, the palpable mistake of describing the land as part of lot 42, instead of 45, which latter has no connection with the village of Ancaster, produces no uncertainty and can create no difficulty.

It is plain on the face of the instrument, what is intended to be granted. It was unnecessary to specify on what lot in the township the village of Ancaster is situated, and wite per inutile non vitiatur.

Norris' Case, Dyer 292, cited in the argument, and others cited in Bac. Abr. Grant, are in point. The subject is carefully and particularly discussed in Sheppard's Touchstone, 247. "If one grant land," (it is said) "and say not in what parish, or county, or village it doth lie, yet if there be "any other matter to describe it, it seems the grant is good enough, and it "may be averred where it lieth," (page 250).

This is sufficient to shew that it was unnecessary to state in what lot in the township it lay, since without that, its position in the village of Ancaster, next to Samuel Andrews' lot on the north, would enable any one to find the land with certainty. Now in commenting on this learned author, Mr. Preston says, in a passage inserted in page 247, "whenever "there is in the first place a sufficient certainty and demonstration, and "afterwards an accumulative description, and it fails in point of accuracy," it will be rejected." These two principles decide the present case.

Per Cur. - Postea to defendant.

SULLIVAN, SMITH AND HECTOR (ATTORNIES) V. BRIDGES.

The attorney who commences the action, must sign the bill of costs delivered.

—Where, therefore, three attornies composing a firm commenced the action, and only one of them signed the bill—Held per Cur., bill insufficient.

The plaintiffs sued as attornies to recover a bill of costs, for £31 4s. $6d_{\cdot p}$ in Iurred in a case of Bridges v. Case, on the common counts.

The defendant pleaded, 1st, general issue.

2ndly, that the demand was for costs, and that the plaintiffs had not at any time before the commencement of this suit, delivered to the defendant, or left for him at his dwelling house, &c., any such bill of costs as was required by the statute.

The plaintiffs replied, "that they did more than one month before the commencement of this suit, viz: on the 1st December, 1847, deliver to the de endant a bill of the said fees, charges and disbursements."

It was proved on the trial, that on the 7th of September, 1847, the defendant wrote to the *plaintiffs*, saying that he had settled with Case, who was to pay their costs.

The written retainer produced on the trial, was of Sullivan alone.

These three plaintiffs were partners before and at the time.

The copy of the bill served was signed, "J. Shuter Smith, plaintiff's attorney," and endorsed on the back, "Sullivan, Smith and Hector."

The proceedings in Bridges v. Case, were conducted by J. Shuter Smith, as "plaintiff's attorney."

It was objected on the trial, that the retainer was to Mr. Sullivan, and that the bill served was not signed by him.

2ndly, that it was not served a lunar month before action (which however was unfounded, as it was served on the 15th of January, and the suit was commenced on the 14th February).

3rdly, that the bill was not addressed to the defendant, nor any statement upon it that the amount of it was claimed as the plaintiff's costs in that suit.

The learned judge held the service to be sufficient; that the defendant had availed himself of the services of Mr. Smith, one of the plaintiffs in this cause, which sufficiently proved the retainer; and that the bill being signed by Smith, as the attorney, was sufficient.

D. B. Read moved for a new trial on the law and evidence, and for misdirection; or to arrest the judgment; or that a repleader be awarded on account of the immateriality of one of the issues; he cited, Arch. Prac. 74; 3 Nev. & P. 553; and referred to the 23 sec. 2 Geo. II. ch. 23.

Galt shewed cause, and relied upon 1 Cr. & J. 548; 2 Dowl. N. S. 304.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, that we are bound to make absolute the rule for a new trial without costs, though there is very little merit in the exception.

The 23 sec. of the 2 Geo. II., ch. 23, enacts: "that no attorney shall "commence or maintain any action, for the recovery of fees, &c., until "the expiration of one month after such attorney (that is, the attorney who commenced the action) shall have delivered unto the party to be "charged therewith, or left, &c., a bill of such fees, &c., which bill shall "be subscribed with the proper hand of such attorney;" and this again must mean the attorney who shall afterwards commence the action.

Here the action was commenced by three attornies, and the bill delivered was signed only by one.

The cases bearing most directly upon this point of signature, are Smith v. Brown, I Tyr. 486; and Owen v. Scales, 10 M. & W. 657; they neither of them warrant us in taking so great a liberty with the statute as to hold this a compliance with it, and though they are not cases exactly similar to the present, they serve to shew what degree of strictness has been held necessary.

It is true, that Mr. Smith was really the sole attorney in the original suit in which the services were rendered. If that shewed that he was alone entitled to sue in this action, then the plaintiffs should fail on the ground of misjoinder; but if on the other hand, the three members of the firm are properly made plaintiffs, which it is necessary for the plaintiffs to maintain, then the words of the statute are express that the bill delivered should be signed by them.

The object of the service of the bill, is to give to the client an opportunity of getting the costs taxed; but if he had availed himself of that privilege, he must have come under an engagement to pay to Mr. Smith the amount taxed; in other words, having retained Mr. Sullivan, he must undertake to pay Mr. Smith, not as one of the firm, but for all that appears, solely.

Per Cur.-Rule absolute for new trial, without costs.

NICHOLS V. KING AND GARSIDE.

A. contracts with a company to make a highway—B. becomes security to the company for the fulfilment of A's contract. A. then employs C. to cut out for him certain timber at a stipulated price. A. while C. is engaged in cutting out the timber, fails in his contract with the company. B. the surety, upon A's. failure, tells C. to go on with his work, and he will see him paid. Upon completing his job, C. sues A. and B. jointly. Held per Cur.—that under these facts, there was no joint contract by A. and B., with C.; but that A. was primarily liable on his contract—and B. secondarily liable as a guarantee.

This was an action of assumpsit for work and labour, to recover wages as upon a joint contract with these two defendants, by whom the plaintiff represented himself to be employed in getting out timber for a public company, associated for the purpose of making a certain highway.

The timber was required to be used in culverts. King had contracted with the company to do the work, and Garside, the other defendant, was his surety to the company for the fulfilment of his contract. King had employed the plaintiff to get out the timber for him at 11s. 3d. per hundred feet; and while the plaintiff was going on with the work, King failed in his contract with the company, the consequence of which was, that the company, through their engineer, gave notice to Garside, as it seemed was usual in such cases, that he must go on and complete the job, or he would be held liable or damages as surety.

Garside thereupon stepped into King's place, and finished the work. The quantity of timber made by the plaintiff was limited, the whole amount used in the culverts did not much exceed 6000 feet, part of which was not furnished by Nichols.

It was proved, that Garside, after he had assumed the work, paid the labouring men whom the plaintiff had hired, every week, which was of course so much money advanced to the plaintiff to be accounted for when he came to be settled with.

It was shewn that what had been thus advanced, in addition to what had been paid to himself, exceeded the sum he was entitled to for the timber at 11s. 3d. a foot.

It was also proved, that the same plaintiff had taken a contract to supply timber to another party at ros. a foot. Yet the plaintiff, pretending that the sum did not yield him fair wages for the time he was employed, and that Garside had assured him that he would see that he did make good wages, brought this action against both King and Garside, claiming upwards of £30, as for a balance due him; estimating the number of days spent in the work, and claiming wages per diem, as if no contract by the foot of timber had been made with him.

The plaintiff had a verdict for £15 damages.

Cockburn, of Cobourg, moved for a new trial on the law and evidence: he cited Peake, 72; 2 Taunt. 49; 2 Camp. 308.

Eccles shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

I thought the action which was tried before me, at Cobourg, not a reasonable one, and so stated to the jury; and it appeared to me besides, that there was a legal difficulty in the way of the plaintiff's recovery,

for I could not see on what ground it could be said, that King and Garside were jointly liable for any part of his demand.

So long as King went on with his contract, he was alone his employer, and if during that time Garside, in order to give him confidence, had told him that he would see him paid, that would only make him secondarily liable as a guarantee; not jointly with King, who would not be relieved by such an undertaking, but would continue nevertheless liable to the plaintiff in the first instance. Then, when upon King's failure, Garside stepped in and took his place, he was thenceforth the person who employed the plaintiff on his own account and not jointly with King. There might be some appearance of ground for charging both in one action, but I could see nothing satisfactory; and there is reason to fear in such cases that the object is to exclude the evidence of the party who could best explain the merits of the case.

The verdict is so small, that we have difficulty in disturbing it; but we think the ends of justice require that the case should be submitted to another jury, upon the condition that the costs of the last trial shall abide the event.

This kind of enterprise, by public companies undertaking, at their own charge, the improvement of roads in different parts of the country, is beneficial to the community. Good faith ought to be observed in contracts with them, as well as between individuals; and it would tend to discourage such undertakings, if groundless actions against them are encouraged by a too ready disposition to relieve those whom they have employed from the conditions of their contracts.

Per Cur.-Rule absolute.

COMMERCIAL BANK AND LEMESURIER ET AL V. BRONDGEEST ET AL.

Where a judgment had been entered on a cognovit, and a fi. fa. issued thereon in the office of the deputy clerk of the crown of an outer district—without the suit having been previously commenced in that office by issuing process or ortherwise—The court, upon application, set aside the judgment, writ, and all proceedings thereon.

Semble, that the assignees of a bankrupt defendant sufficiently represent the interests of the bankrupt estate—to move on this exception to the

judgment.

In these cases a rule nisi was obtained by *Freeman*, of Hamilton, to set aside the judgment and f. fa. issued thereon, and all proceedings under it, because the judgment was entered on a cognovit, in the District of Gore, in the office of the deputy clerk of the crown there, and a fi. fa. issued therefrom, without the suit having been previously commenced by issuing process or otherwise.

Judgment was entered on the 14th April, 1838, on a cognovit; there being no previous process or papers of any kind filed in the office, and a fi. fa. was issued the same day.

Cameron, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We all concur in the opinion, that the statute 8 Vic. ch. 36, sec. 3, gives no authority to enter judgment in the district office upon a cognovit, except where that cognovit has been given in a suit already instituted, and then pending there.

It is reasonable to suppose, that the legislature intended that, and it bears in reason only that construction.

When, therefore, it is shown that a final judgment has been entered in a district office, which that statute does not authorise, it can be no more regular and binding than it would have been, if no such statute had been passed, and it is our duty to see that it does not stand as a legal judgment of this court, for it might mislead purchasers and others, and work some serious injury.

We think also, that the assignees of the bankrupt defendants can move in this exception as representing the interest of the estate.

In Charlesworth v. Ellis, 7 Q. B. R. 685, the assignees of a bankrupt moved in like manner against a judgment that had been entered against the bankrupt,

Per Cur,-Rule absolute.

SIMPSON V. CARR.

The plaintiff sued the defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting, at Hamilton.—The defence was that the society, which is an incorporated body, was liable, and not the defendant personally. The learned judge, at the trial, left it to the jury to find, upon the evidence, whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen, who undertook to superintend—in either of which events, he held him to be personally liable,—but the jury were told that if he contracted only as representing, or on behalf of, the corporation—that then he would not be personally liable. Held per Cur., on motion for a new trial—the verdict being for the plaintiff—that the ruling of the learned judge at the trial was correct.

The plaintiff sued in assumpsit on the common counts.

Plea, non assumpsit.

The plaintiff had furnished lumber for putting up sheds, pens, &c., on the occasion of the provincial agricultural meeting, at Hamilton, in October last, and had done work in preparing the required accommodation.

The defence was, that the society, which is an incorporated body, was liable, and not the defendant individually. There was evidence to shew that the defendant was one of a committee, who undertook to superintend the preparations; and the learned judge left it to the jury to find whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be liable; but the jury were told that if he contracted only as representing or on behalf of the corporation, then he would not be liable.

The jury found for the plaintiff, £64 4s. 4d.

The defendant moved for a new trial on the law and evidence, contending that he had incurred no personal responsibility.

ROBINSON, C. J., delivered the judgment of the court.

In all cases like the present, it may become a question for the jury to whom the plaintiff gave credit when furnished materials, or did the work sued for; and I think that was properly a question for the jury in this case, and that it was rightly left to them. There was indeed express evidence given by one of the witnesses, William Eagan, that the defendant did himself assure the plaintiff that he would see him paid,

and whatever might have been the understanding between the defendant and the other members of the committee of management, or between the committee and the Agricultural Society as a body, it is plain that this defendant might in his discretion, and confiding in the sufficiency of the fund from whence the expenses were to be defrayed, have ventured to give the orders to carpenters and others as from himself, without giving them to understand that they must be content to take their chance of being paid by the corporation.

In many cases, in order to assure the work being done promptly and with spirit, such a course is taken by those who have consented to superintend the arrangement, and if this defendant ordered the work upon that footing, or if the committee of which he was a member did so, he alone in the one case, and all the members of the committee in the other case, would be

responsible in the ordinary sense as contracting parties.

Taking it either way, the verdict in this case would be supported, because the non-joinder of other members of the committee could of course only be pleaded in abatement.

If the evidence had been such as to entitle the jury to say clearly, that the plaintiff had only contracted with the corporation, then of course this verdict would be improper. There is too much, however, in the evidence that has an opposite tendency, to admit of our coming to that conclusion.

Notwithstanding that the Agricultural Society is a corporate body, capable of suing and being sued, and that an action might, upon the evidence, have been sustained against the coporation upon the contract made by the committee as their agent, yet it would not therefore follow that the members of the committee may not, by their method of dealing with the defendant, have rendered themselves liable as contractors.—3 Bing. N. S. 814.

There is a large class of cases, in which persons in public capacities, contracting on behalf of the government, are acknowledged to be exempt from personal responsibility; but in many such cases, if the party not announcing the public character in which he acts, will make contracts which for all that appears, are on his own account, he may be treated as personally liable.

In McBeath v. Haldimand, I T. R. 172, the principle is very clearly laid down. When there is no ground for saying that the defendant acted otherwise than as agent for the government, or for a corporate body, or some private party, then of course the party furnishing goods, must take his remedy against the fund to which he gave credit.

If the evidence had shown this to be clearly a case of that kind, there would have been no difficulty in applying the principle. Parties must be cautious in these cases, where they do not mean to incur any personal liability, that the footing on which they are contracting, is clearly understood.

There is a good deal of reason in the present case to infer that the defendant did dot feel it necessary to be guarded in this respect, relying with confidence on funds being certainly forthcoming from proceeds of fees for admission to the ground; and it seems that in reality there was a fund realized, which if properly applied, would have prevented any occasion for this action; but by some misunderstanding, it was diverted

to other objects connected with the society. It would be hard to call upon third parties, as a matter of course, to run all risks of a deficiency of funds from such causes, when they had not been given to understand that they were to look only to the society for their remuneration.

The strongest fact in favour of the defendant is, that the plaintiff sent in his tender "addressed to the managing committee of the Agricultural Society;" but that was not conclusive to shew that he did in fact contract with the corporation only, because what was called the managing committee on this occasion was not necessarily composed, it appears, of members of the society, but was merely an association of gentlemen who had taken upon themselves the task of providing suitable accommodation for the society's exhibition.

The committee, after it had been so deputed to act, might have proceeded in such a way as to render themselves liable as so many individuals, and so might any one of their number. The evidence was of such a description as fairly to raise a question for the jury, and we cannot see that they have decided it wrong—(See Prosser v. Allan, Gow's, N. P. C. 117; Keate v. Temple, B. & P. 148.)

Per Cur.-Rule discharged.

CUVILLIER ET AL. V. THIBODO.

In an action upon a bond—the attorney for the plaintiff, who was the subscribing witness to the bond, was called to prove its execution.—His evidence was objected to by the defendant, on the ground that he had become answerable for costs. To obviate this difficulty, the attorney paid into court a sufficient sum to cover the costs, and was then allowed to be examined. Held per Cur.—on an application for a new trial—that the evidence of the attorney, after paying the money into court, was properly received.

In this case the action was upon a bond. The plaintiffs reside in Lower Canada; and their attornies by whom they sued were Messrs. Kirkpatrick and Burrowes, the latter of whom was a subscribing witness to the bond on which the action was brought.

When he was called, the defendant's counsel objected to his competency, on the ground, that he had made himself answerable for costs. Mr. Burrowes did not deny that he had done so, though it appears that since the trial he had ascertained that he had not in fact given any bond or other security for the costs; but that on being applied to by the defendant's attorney, he, or his partner, had said that they would be answerable for them.

At the trial the Chief Justice held, that the objection might be removed as in case of bail, by a sufficient sum being deposited with the clerk of assize to cover the costs; and he named £20 as apparently sufficient to cover the costs of the defence. Mr. Burrowes happened to have as much money in court, and deposited it with the clerk, and being allowed to give evidence, he proved the execution of the bond.

Verdict for the plaintiff.

McKenzie, of Kingston, moved for a new trial and the law and evidence, and for misdirection; and for the reception of improper evidence. He cited I M. & S. 9; 2 Esp. C. 835; I Str. 129; 3 Star. 184: 5 Dowl, 529; 3 Camp. 380.

Burrowes, of Kingston, shewed cause, and referred to 1 Moo. & Rob. 329.

ROBINSON, C. J., delivered the judgment of the court.

My brothers agree with me, that it is reasonable to look upon the £20, not as being deposited by Mr. Burrowes in his character of security for costs merely, and in order to entitle himself to be heard as a witness, in which case the objection would apply; but as money advanced by him on behalf of his client in the same way as other disbursements are made, and therefore to be repaid to him in either event, by its being returned to him from the court if his client succeeded (as it seems it actually has been), or repaid to him by his client, if the event of the suit had been the other way.

In Lees v. Smith, I Mod. & Rob. 320, a witness who had given a bond to the defendant for the costs of the action, was allowed to give evidence on depositing the amount of the penalty of the bond, with the officer of the court. Both Mr. Starkie and Mr. Roscoe in their respective works on evidence, state this case as if it were the witness who deposited the money in the court.—I Stark. Fv. 142; Roscoe Ev. 142.

With respect to the attempt made to support the defence of usury, there is really nothing to be argued. There was not the slightest ground laid for inferring an agreement by the defendant before or at the time of giving the bond to pay usurious interest. All that was shewn was, that the bond being given apparently bona fide, and upon no corrupt understanding of any kind to secure the repayment of advances, which the plaintiff agreed to make to the defendant, to enable him to purchase produce and send it to market, and the conditions being that the defendant should, on settling an account from the plaintiff of the monies so advanced pay him within a certain time thereafter such amount as should happen to be lawfully due to him, the plaintiff did render his account containing some charges for commission, which the defendant always strenuously resisted and declared he never would pay, and which charges in consequence of his opposition were abandoned.

There was really no proof whatever of that usurious agreement between the parties, which alone could avoid the bond. There was no proof of any antecedent dealing between these parties, in the course of which usurious charges had been made and submitted to, and from which the inference might be attempted to be drawn, that by a tacit understanding the bond was intended to secure further advances, which were to be made on the same usurious terms.

Per Cur.-Rule discharged.

ALEXANDER V. A. B. AND C. D. ATTORNIES.

Under the 1st, 8th & 18th clauses of the Insolvent Debtor's Act, 8 Vic., ch. 48 — the right to sue an attorney for negligence, vests in the assignee of the bankrupt plaintiff, not in the plaintiff himself.

Declaration. Case against attornies for negligence, in so conducting the pleading of a suit, as to deprive the plaintiff of certain evidence, which, if admitted, would have sustained his cause of action, whereby the plaintiff lost the suit, and had to pay a large sum of money for costs, &c. Plea. The insolvency of the plaintiff—the appointment of an assignee in the Insolvent Court—and the vesting of the cause of action in him.

Demurrer. That the declaration disclosed a cause of action which did not pass to or vest in the assignee of the plaintiff.

Duggan, for the demurrer, cited 13 M. & W. 571.

R. P. Crooks, contra, cited 8.Bing. 366; 9 Bing. 95; 11 M. & W. 313; 2 Bro. & Bing. 102.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, that the cause of action declared upon in this action, is one that has vested in the plaintiff's assignee, under the Insolvent Debtor's Act, 8 Vic., ch. 48.

The question depends on the effect to be given to the 1st, 8th and 48th sections of the statute. The first clause provides, that the estate and effects of the insolvent debtor shall vest in the official assignee. The 8th clause adds to those works "estates and effects," the words "and all the credits of the petitioner." The 18th clause gives power to the assignee to sue for the recovery of any "property or rights" of the petitioner.

It is plain that these clauses are to the full as comprehensive, in respect to what shall vest in the assignee, as the English act, 6 Geo. IV., ch. r6, which speaks only of "real and personal estates and debts:" and under the English act it has been repeatedly decided, that causes of action, of the same description as that which is sued upon in this action, become vested in a bankrupt's assignees.

The cases of Wright v. Fairfield, 2 B. & Ad. 727; Gibson v. Carruthers, 8 M. & W. 321; I M. & S. 521; II M. & W. 315, were cited in the argument, and they clearly go the length of sustaining the plea, by shewing that it is the assignee, and not the plaintiff, who can now sue on this cause of action.

The case of Knight v. Quarles, 2 Bro. & Bing. 102, is in point, as an authority for an action being brought by an administrator against an attorney for negligence in investigating a title at the request of the intestate, upon the principle, that the cause of such an action has its foundation in a contract express or implied, and that the negligence complained of has a direct tendency to diminish the personal estate.

The distinction between such causes of action, and those for torts of a strictly personal nature, such as assault, slander, seduction, &c., is a very clear one. In this very case, part of the injury for which the plaintiff seeks to obtain compensation is his being compelled, by the negligence of the defendants, to pay a bill of costs, the amount of which he is thus evidently attempting to recover back. This is a claim more nearly coming up to the idea of a debt, than many which have been treated as vested without doubt in the assignee of a bankrupt.

Per Cur.-Judgment for the defendant on demurrer.

MITCHELL V. LINTON.

Declaration in covenant on a mortgage to pay a sum of money on a day named. Plea.—That defendant had not broken his covenant. Held, per Cur., plea bad on special demurrer.

Declaration in covenant on a mortgage to pay a sum of money on a day named.

Plea-that defendant had not broken his covenant.

Demurrer to plea (which was not attempted to be supported.)

ROBINSON, C. J., delivered the judgment of the court.

The plea is undoubtedly bad on special demurrer.—I Lev. 183; 3 Lev. 19; 2 Taunt. 278; 4 P. & D. I.

Per Cur.—Judgment for plaintiff on demurrer.

PERRY V. GROVER.

Semble: that a demurrer cannot be amended without the consent of the opposite party. Where, therefore, the defendant intending to demur to the replication to the second plea, did in fact demur to the replication to the first plea; Held, per Cur., that they could not decide upon this demurrer, as if it were a demurrer to the replication to the second plea.

Endorsee against the maker of a note for £47 10s. in favour of one J. D. Goslee, and endorsed by the said J. D. Goslee to the plaintiff.

Plea. 1st. Non-fecit.

2nd. No consideration either for making or endorsing the said note.

Replication to first plea—similiter.

To second plea—that the endorsement by the said J. D. Goslee was an endorsement in blank, and not a full or special endorsement, ordering the payment of the money in the said note specified, to be made to any particular person or order. And that after the said endorsement, and before the said note became due and payable, to wit, &c., James Perry being the lawful holder of the said note, and entitled thereto, delivered the same to the plaintiff with the endorsement thereon, upon and for a good and sufficient consideration, and for value, to wit, the amount of the said note; and this the plaintiff is ready to verify, &c.

Demurrer to the replication to first plea to first count—that the said replication, instead of having directly denied that the said note was made and endorsed for the accommodation of the plaintiff without value, in an indirect manner traversed the same, admitting that the said note was endorsed and delivered to a third person, being the lawful holder of the same, who delivered the same to the plaintiff for value.

D. B. Read, for the demurrer, cited 3 M. & W. 409; 6 M. & W. 135; 12 A. &. E. 428; I Salk. 324; 4 U. C. J. 489; I Ch. Pl. 453; to E. R. 142; II M. & W. 475.

Campbell, extra.—(no cases cited.)

ROBINSON, C. J., delivered the judgment of the court.

The defendant has chosen to demur to the plaintiff's replication to the first plea pleaded to the first count, which replication is in fact nothing more than a similiter to the plea of non-fecit; but he contends that we should decide upon his demurrer, as if it were a demurrer to the replication to the second plea. This would be an indulgence which I imagine has not been hitherto extended, in order to give facility to a special demurrer. The cases he refers to establish the point, that a

similiter is not a plea; but that only shews that he is calling for the judgment of the court, upon a pleading that does not exist. A demurrer, it is said, cannot be amended without the consent of the opposite party.

The replication, however, seems beyond doubt exceptionable, if it had been properly excepted to. The plaintiff, in pleading it, departs from the statement of his title, which he had set out in his declaration, deriving it in the declaration by immediate endorsement, which includes delivery from Goslee, whereas he deserts that ground on the replication, and entitles himself by endorsement and delivery of James Perry.

And besides, waiving any question about the departure, and taking the facts to be as set forth in the replication, yet they only shew, that he, being really the party who ought to have taken up the note (according to the defendant's plea, which he does not deny), has in fact taken it up; but that would give him no right to claim to be repaid by the party who made the note in the first instance for his accommodation.

Per Cur.-Judgment for plaintiff on demurrer.

Young v. Stockdale et al.

Judgment of non-pros. cannot be signed because the plaintiff has not served a similiter—(see 19th rule Easter Term, 5 Vic.)—upon issue joined. The court, in passing the record, will add the similiter, as of course.

In this case a rule nisi was obtained by J. Lukin Robinson to set aside judgment of non-pros. for irregularity with costs, upon the grounds of: 1st. Misconduct of the defendants' attorney. 2ndly. No warrant of attorney having been filed by the defendants' attorney. 3rdly. Because signed after the plaintiff had filed similiter, and given notice of trial. 4thly. Or on merits, paying costs.

The question was, whether after a *similiter* had been filed, a judgment of *non-pros*. could be signed, because the *similiter* had not been served, after notice of trial had been served on the defendants, and retained without objection.

Judgment was signed on the 6th May, 1848. The plaintiff applied for relief to a judge in chambers on the same day. No appearance paper or warrant of attorney for the defendants had then been filed.

A similiter was demanded by the defendants, and before the time had expired one was filed, and soon after notice of trial was given; and when the plaintiff's attorney went to the office of the deputy clerk of the crown for the London District to pass his record, he was told that judgment of non-pros. had been signed, and that the papers had been sent to Toronto. But judgment had not in fact been signed till many days after the deputy clerk of the crown made that statement, nor till the very day when the plaintiff's attorney moved the judge against the judgment which he supposed had been signed on the 6th of May.

ROBINSON, C. J., delivered the judgment of the court.

The defendant seems to have relied on the case of Hollis v. Buckingham, 3 D. & R. I, where the court held a judgment of non-pros. to have been regularly signed, because the plaintiff who had filed a similiter had not also delivered it. The court said, that according to the practice

of the court, as certified by the master, the *similiter* should have been delivered.

But with us there is something stronger than the mere practice of the court to warrant the contrary, for nothing can be more express than our 19th Rule of Easter Term, 5 Vic., which provides, "that in all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to "allege any new matter, the plaintiff may proceed as if the cause were at issue, and the clerk in passing the record shall enter the similiter as of course."

Besides, there is the further defect in this case in the defendant's proceedings, that he did not enter a warrant of attorney when he signed the judgment of non-pros.; but, without adverting more particularly to that, the plaintiff had a right to proceed as if the cause were at issue. There were several pleas all concluding to the country. The similiter, moreover, not being a plea, need not be delivered, and the defendant here received and retained the notice of trial without objecting.

Per Cur.-Rule absolute.

DOWNS V. MACNAMARA.

Where a plaintiff seeks to recover upon a special agreement still open and executory, and fails from not having made a legal demand upon the defendant to do the work agreed upon—he cannot, after such failure, be allowed to recover upon the common counts.

Writ of trial to the judge of the district court of the district of Gore.

The plaintiff sued in assumpsit, declaring in the first count of his declaration, on the following writing as a promissory note.

"Hamilton, Oct. 27, 1841.

"Two months after date, we either of us, promise to pay or cause to be paid, to John W. Downs, or bearer, the sum of 141. cy., to be paid in carpenter and joiner work, such as may be required, and to be done in a workmanlike manner, at cash price, with interest, for value

" received.

(Signed)

"Lawrence MacNamara.

"H. F. Martin.

"Robert Dunlop."

Counts were added for money had and received; and on an account stated.

The defendant demurred to the first count, and had judgment in his favour, and pleaded the general issue to the common counts.

At the trial in the district court, under the writ of trial, the plaintiff gave some evidence of a demand upon one or more of the parties to do work, but not until four or five years after the note was made. Various objections were taken on the ground, that no sufficient demand to work was shewn—no request of all the defendants—that it was not made in a reasonable time—that there was no offer to find materials, and no specific request to do any particular work.

The judge, it appears, doubted as to the effect that should be given to some of their objections; but he held, that the plaintiff could not,

under the circumstances, advance this special agreement as evidence under the common counts; not because there was judgment against him on the special count, which was one of the grounds taken by the defendant's counsel, but he thought the plaintiff was not at liberty to lay aside the special agreement, or rather to use it only as evidence of money had and received, or an account stated.

The plaintiff was on this ground non-suited,

R. P. Crooks moved to set aside the non-suit, and cited Waddle v. McCabe, E. T. 4 Will. IV.; Teal v. Clarkson, H. T. 6 Will. IV.; Hogan v. Malone, H. T. 7 Vic. Freeman of Hamilton, shewed cause, and referred to Holden v. McCarthy, E. T. 6 Will. IV.

ROBINSON, C. J., delivered the judgment of the court.

It appears to us, that the non-suit must stand.

With respect to the general question of the defendants being liable on the ground of having broken their agreement. It is clear, that the plaintiff was bound by the contract to make a specific request to the defendants to do certain work; he could not reasonably ask them to go to a distance to labour for him, which was one of the grounds on which Dunlop objected to comply; and the plaintiff was bound to furnish materials.

As to the time when the request might be made, I conceive the defendants could not be called upon to do anything until two months had elapsed; then they must have a reasonable time allowed them for earning the money. It could not, in the nature of things, be done all at once. That the plaintiff could be held bound to make his request within any particular time, we could not determine, upon any legal principle.

I should have some difficulty in deciding, if it were necessary, whether a sufficient demand was proved to have been made upon any of the parties. If there had been a good demand shewn as to one, I assume that that would have authorised a recovery against all. That question, however, had not been raised.

The pon-suit was proper, I think, because the plaintiff having only the common counts to resort to, could not, under the circumstances of

this case, be allowed to recover upon either of them.

The special contract was open and executory, and his proper remedy was upon that. I Saund. Rep. 269, C., where the contract had been in part performed, as it was proved to have been in this case, so that the defendant would not be placed in statu quo, if the plaintiff could treat the special agreement as rescinded.

In Hunt v. Silk, 5 E. R. 449, the principle is laid down as clear and undoubted, that a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the

contract.

I do not at present admit that even without this circumstance of part performance, the plaintiff could sue upon the common counts, treating the contract as rescinded merely because the defendant had not performed it. That is a point upon which the ruling of the courts seems not to have been uniform.

Where a party to an agreement has so conducted himself as to have lost the benefit of his special contract, and cannot sue upon it, but has yet done labour which the other has accepted, then he must of necessity be allowed to recover under the common counts, or he would have no remedy whatever.

Here the plaintiff could, without difficulty, have sued upon his special contract, if he had made a request to have the work done, which he attempted to show he had done.

I do not see how we could allow the plaintiff to recover on the common counts at the trial, when he had not repudiated the special agreement, but, on the contrary, evidently desired to hold the defendants to it. It would be repugnant, I think, to the judgment in Cooke v. Munstone, I N. R. 351, which is a leading case on this subject; though I must confess I am unable to reconcile all that is said in it, with cases that have been decided before and since.

In this case, besides, some ground is laid in the evidence for apprehending that these parties were not contracting on the same footing, but one or two of them as sureties only; in which case it would be clear, that as against such parties, there would be no ground to recover under the common counts, and consequently the action would fail as to all,

But it is upon that point in the case, on which there is no doubt as to the facts, that I think the nonsuit was proper, namely, that there is here a special contract open and executory, of which there has been a part performance, so that both parties cannot be put in statu quo, upon which agreement the plaintiff is in a condition to sue, and therefore must sue, having clearly not abandoned it, but having made it, on the contrary, the very ground and only ground of his action.

The proper measure of damages, is the injury sustained by the special agreement not having been wholly carried out.

Per Cur.—Rule discharged.

ANDERSON V. VANSITTART ET AL.

The plaintiff charged the defendants upon a special agreement, stated to have been made by them as trustees, to furnish with fuel, when required, the plaintiff, a school teacher under the act 9 Vic. ch. 20. To this declaration the defendants demurred, on two grounds; 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants, having made the agreement stated in the declaration in their corporate capacity, were not liable as individuals, but had been so charged in the declaration. Held, per Cur., declaration bad—upon both grounds of demurrer.

The plaintiff charged the defendants upon a special agreement, stated to have been made by them as trustees, to furnish with fuel, when required, the plaintiff, a school teacher under the act 9 Vic. ch. 20. To this declaration the defendants demurred, on two grounds: 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants having made the agreement stated in the declaration, in their corporate capacity, were not liable as individuals, but had been so charged in the declaration.

D. B. Read, for the demurrer, cited 2 C. & J. 416; 3 Tyr. 468; 2 G. & D. 159; Smith's Mer. Law. 72; 2 Ch. Pl. 15; 6 M. & W. 815; 1 A. & E.526.

G. Duggan contra,—(no cases cited.)

ROBINSON, C. J., delivered the judgment of the court.

If this action were otherwise well brought, the declaration must be held had on demurrer, for want of the averment of a special request to furnish fuel.

The defendants, according to the agreement stated, only engaged to furnish it when required, and could therefore be charged with no breach in not delivering fuel without first shewing a request; and this being a mat rial traversable fact it should have been laid, with statement of time and place.

but, for the principal reason assigned, I am of opinion that the defendants are not entitled to judgment.

The statute, 9 Vic. ch. 20, sec, 25, makes the school trustees in each township a corporation, with capacity to sue and be sued, and makes it expressly part of their public duty to engage teachers, and provide fuel for the school.

We must therefore look upon them as acting, in those particulars, in their public corporate capacity, within the scope of their authority; and the plaintiff expressly charges them upon an agreement made by them as school trustees,

It is only in that character then that they are liable, and not in their private individual capacity. I am far from saying, that if the plaintiff had not charged the agreement to have been made by them as trustees (which was only stating the truth), he could have established any claim against them individually, but having expressly so charged it, the case is free from any doubt.

In the cases of Brown v. Morris, 2 Taunt. 374; Keating v. Temple, 1 B. & P. 158; and Prosser v. Allan, Gows. N. P. C. 117, shew the impossibility of maintaining this action in its present form.

The defendants were merely carrying into effect, in a corporate capacity, the provisions of an act of parliament, not a private local act, but a general law of the land, which the school teachers and all others are bound to notice.

The plaintiff, therefore, must be taken to have known, and doubtless didknow, that they were contracting with him on behalf of the public, and not individually; he could only look to the public fund for his remuneration, and not to the trustees individually, as being personally liable; and when he tells us in his declaration, that they only contracted with him as trustees, he deprives himself of all pretence for holding them liable in their natural capacity.

Per Cur.—Judgment for defendants on demurrer.

DURAND V. STEVENSON.

Payee against the maker of a note. The defendant pleaded—that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, which had a certain time to run, the plaintiff agreed not to sue upon the note made by the defendant, until the other notes should become due; Held, fer Cur., upon general demurrer—plea bad.

Declaration by payee against the maker of a note.

Plea: that after the said promissory note became due, and before the commencement of this suit, to wit, &c., the plaintiff, in consideration

that the defendant had then given to him, the plaintiff, a certain promissory note, made by one George Bostwick, bearing date, &c., and payable one month after the date thereof, to one Robert Stevenson or bearer, for the sum, &c.; and also had obtained from the said George Bostwick, and delivered to the plaintiff, a certain other promissory note, made by the said George Bostwick, bearing date, &c., to the plaintiff, for the sum of, &c., as security for the payment, &c.; agreed to forbear and give time to the defendant, and did give time to the defendant, for the payment of the said sum of money, in said promissory note in the declaration of the plaintiff mentioned, until the said promissory notes so made by the said George Bostwick, and by the defendant delivered to the plaintiff as aforesaid. should become due and payable; yet the defendant saith that the plaintiff. contrary to the agreement so by him made as aforesaid, before the said lastmentioned promissory notes or either of them became due and payable, and while the said plaintiff was the holder of the said last-mentioned notes, on, &c., commenced this suit against this defendant, for the recovery of the residue of the said sum of money, in the said promissory note in the declaration of the plaintiff mentioned, and this the defendant is ready to verify, &c.

Demurrer: that the defendant could not set up, as a bar to the note, a collateral agreement made between the defendant and the plaintiff, after a cause of action on the note had accrued, but that the agreement, if it existed, formed only the subject-matter of a cross action.

Bell & Durand, for the demurrer, cited 5 T. R. 513; 2 T. R. 24; 1 D. & L. 630; 2 C. M. & R. 480; 16 L. J. 231; 11 A. & E. 216; 3 M. & W. 210.

Arch. McLean, contra, cited 2 Cr. & J. 404; 1 Esp. C. 109; 2 Cr. M. & R. 187, 159; 2 Wils. 253; 1 B. & Ad. 603; 15 M. & W. 672.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff is, in our opinion, entitled to judgment on this demurrer. No authority will be found to go the length of supporting the plea. What is pleaded is not like the common case of a note being given for goods sold, which has the effect of suspending the action for the price of the goods till the note comes to maturity. That is treated as a peculiarity in the law, confined to transactions of this nature, of which the intention and effect, at the time of the original agreement, is to give credit by extending the period of payment to the day mentioned in the note. It is an admitted exception to the general principle, that the right to a personal action, once suspended, is gone.—2 Saund. 103 (c).

This plea sets up as a defence, not that a note of the party was given at the time which would suspend an action upon the original demand, by shewing a credit agreed upon—nor does it state that the note of a third party was afterwards given and accepted as a satisfaction—but that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, which had a certain time to run, the plaintiff agreed not to sue upon the note made by the defendant until the other notes should become due—which means, I suppose, that he was not to sue on this note, unless the others should be dishonoured.

If such an agreement were made, and not kept, the defendants remedy could only be by a special action for the breach of it. It would be no bar to the action against the defendant on his note.—16 L. J. 231; 2 Cr. M. & R. 197, 480; 15 M. & W. 672; 12 Jurist, 310.

5 U. C. Q. B.

THE QUEEN V. THE BANK OF UPPER CANADA.

The president of the Bank of Upper Canada, not being an officer of the bank—within the meaning of the 16th clause of the Bank Act, 6th Vic. ch. 27—is not prohibited from voting by proxy at the annual election of the bank directors,

Semble: that if the restriction had applied to the president—and he had nevertheless voted by proxy—The court, though they possibly might have interfered by issuing a quo warranto—would certainly not have directed, in the first instance, a mandamus for a new election.

The court was applied to in this case for a writ of mandamus to the Bank of Upper Canada, to proceed to a new election of directors of the said bank for the current year; the ground for the application being, that at the election on the first Monday in June, being the day appointed by the charter, William Proudfoot, Esq., being then (as it was assumed) the actual president of the bank, voted upon proxies given to him by absent shareholders, contrary to the 16th clause of the Bank Act, 6th Vic., ch. 27, which enacts, "that it shall be lawful for absent shareholders to give "their votes by proxy, such proxy being also a shareholder, and not being "either a cashier or other officer in the said bank."

Baldwin, Attorney-General, shewed cause; and in support of the points raised, which appear in the judgments of the court, he cited 2 N. & M. 487; 6 A. & E. 153; Cole on Quo. Warr.; 11 A. & E. 508; 2 T. R. 259; 3 A. & E. 467; 6 A. & E. 349; 7 A. & E. 215, 421, 966; 4 Burr. 2008; 4 T. R. 699; 11 A. & E. 512; Willcocks, 361, 357; Angel & Ames, 436, 479; 3 Mod. 12; 1 Str. 627; 1 Sid. 33; Dwarris, 758; 2 Co. 56; 2 Inst. 478.

Cameron, Q. C., in support of his rule, cited 2 T. R. 180; Willcocks, 252; Sec. 357; I Barn. 345; 6 T. R. 302; 2 B. & C. 596; 6 E. R. 356; 2 Smith, 535; II A. & E. 512; Law Times, 6th May, 1848, III; Wilcocks, 3I; 4 E. R. 308; Andrews, 174, 392; Plowden, 36, 467.

ROBINSON, C. J.—Waiving any consideration of some particular objections which were urged against the sufficiency of the affidavit on which the application has been made, I am of opinion, that, assuming this to be a case to which the remedy by quo warranto is applicable, we could not properly interfere by mandamus to direct the bank, by which I suppose is meant the shareholders in the bank, to proceed to a new election of directors, while there are at present fifteen persons actually filling the office of directors, and discharging the duties, under an election made at the proper time and place, and which we could not treat as an absolutely void election upon an application of this nature, and on such a ground as is alleged. The places of these incumbents must first be declared vacant upon a formal proceeding, upon which they shall have been called upon to defend their seats, before we could direct an election to be held for choosing other directors.

That an election may be, for some reason, so manifestly a nullity, as to enable this court to look upon the office as not being actually full, cannot be denied, because cases of that description have occurred in England, which were cited in the argument.

If, for instance, the shareholders of this bank had met on the first Monday in May, and made an election of directors, before the term of office of the others had expired, we might have felt no difficulty in commanding them by writ to proceed to another election on the day fixed by the charter, regarding the election made in May as a perfect nullity; but we should not, in such a case, have been proceeding upon any objection to the qualification of the persons electing or elected, or to the legality of votes.

We have had occasion, in more than one case in this court, to consider and act upon the distinction between an extreme case, such as that supposed, and cases like the one before us, where an election has been carried on apparently in good faith, being assumed and intended to be regular, but where some question of law has been raised, on which the

legality of the election has been impeached.

I do not feel it necessary to go further into this point, and should not have adverted to it, indeed, for any other purpose than to guard against the inference that we considered the distinction a doubtful one, if nothing were said on the subject. Nor do I think it necessary to examine more particularly how far a trading corporation of this description, not connected with any purpose of public government, would be the proper objects of a proceeding by quo warranto. I assume that it may be, where the object is not to call in question by what right such subordinate officer of the corporation pretends to hold his office, but whether the corporation itself has not as a body acted in disregard of the provisions of its charter.

The purpose of this application will probably be answered by an expression of our opinion in any shape, on the question of law which has

been raised.

It is my opinion, that the directors elected in June, 1847, were not in office while the new election in June, 1848, was going on, having been elected only for a year; or in the words of the 6th clause "for the ensuing twelve months," which would expire, I think, on the day preceding the next annual election day, and would not include the day till which they were elected to serve.

The 6th clause contains evidence that this is what the legislature meant, for it provides that in case of a vacancy in the office of president, the directors shall choose another from among themselves, "who "shall fill the office till the next general annual meeting of the shareholders."

I am aware that the word "till" is not necessarily, and in all cases, to be taken as exclusive, but on the whole view of the act I consider it to be so in this case, and that Mr. Proudfoot was not a director, and so could not be president at the moment of giving in the votes upon the proxies entrusted to him.

I am further of opinion, that if he were president, he would not have

been an officer coming within the prohibition referred to.

It may be said with reason, that so far as the legislature may have meant by that provision to exclude the influence of any personal interest or motive in the election, and to secure its proceeding upon an enlarged view of the public interests, they might have felt it proper, if the contingency had been suggested to them, to prevent even the president of the bank from voting upon proxies, where he had been ordinarily in the receipt of emoluments from his office; but the enactment does not, on the sound principles of legal construction, warrant our holding that they have included him in the restriction, and the act bears evidence on the face of it, that they did not intend to do so.

The 13th and 22nd clauses both shew clearly that the legislature did not use the term "officer" in such a sense as to include the president, or other directors, who are governors or managers, rather than officers of the institution.—3 B. & Ad. 125.

For this reason as well as the other, I consider the objection that has been taken to the election, not a valid one, and it is satisfactory to find it affirmed on the one side, and not denied on the other, that nothing new and unusual was done on this occasion, nothing but what had been done at each election through a long series of years, without being hitherto questioned.

The rule should in my opinion be discharged.

MACAULAY, J.—In my opinion the rule should be discharged on the ground, that Mr. Proudfoot (admitting that he was a director, and president on the day of election) was not an officer in the bank, within the meaning of the 16th section of the act; at the same time I do not say that he is not in a more enlarged sense an officer of the corporation.

The 6th section speaks of the president and vice-president holding their offices during the period therein mentioned, and of vacancies occurring in the office of president or vice-president, and of filling the vacant office, &c.; and the term officer as used in sec. 31st, may, considering the way it is introduced and the object of the clause, be applicable to and include the president and vice-president if instructed and guilty of a breach of trust as therein specified.

The 13th sec. empowers the directors (including the president) to appoint such cashier, officers, clerks and servants under them as shall be necessary; that the term directors includes the president, if it could be otherwise doubted, is shewn by the previous sec. No. 12, and the choosing a president or vice-president is otherwise provided for in sec. 6.

The expression in sec. 16 is, a cashier or other officer in the bank—an expression peculiar to this clause. Section 20 mentions director or officer as distinct persons. So does sec. 22 in the proviso—all tending to shew I think that a distinction is intended between them in sec. 16.—Sec. 4 & 5 Vic. ch. 98, sec. 18, Montreal Bank; 6 Vic. ch. 26, sec. 17, Commercial Bank.

The object and policy of the 16th sec. is, that the servants of the institution should not by the facility of proxy in voting, acquire the power of electing their masters, those whose duty it is to superintend their conduct in the management of the affairs of the bank.

McLean, J.—To entitle the objection to the election to have any weight, it must clearly appear, that Mr. Proudfoot was president of the bank at the time he gave the votes objected to, and that being president, he is to be regarded as an officer of the bank within the meaning of the 16th sec. of the act 6th Vic. ch. 27.

This act was passed on the 12th Oct., 1842, and it declares that the directors who had then been elected, should continue in office until the first Monday of June, 1843; and it provides that on the first Monday in June, 1843, and on the first Monday in June annually thereafter, fifteen directors should be elected by the shareholders who should be capable of serving as directors for the ensuing twelve months.

It is quite clear, I think, that neither the president nor any other director can continue in office for any greater period than twelve months from the day of election, and that being elected on the first Monday in

June, they must cease to be directors before the first Monday of June in the following year. Immediately on being elected, even before a president is chosen, the directors have power to transact any business of the bank, and they can exercise that power until the first Monday in June ensuing; when that day arrives their authority ceases, and they, until re-election, become only stockholders, the same as any other shareholders of the capital stock. If an election of directors on the day appointed by law were omitted, the consequence would be that the shareholders would be without any board of management, and the omission could not be supplied except at a general meeting to be called in the mode pointed out by the 17th sec. of the Act of Incorporation; neither the president nor the board of directors for the former year could have any right to assume the control of the bank affairs any more than any other shareholders possessing the same interest in the concern.

It appears to me clearly from the terms of the statute, that Mr. Proudfoot ceased to be president of the bank before the first Monday in June, and that at the meeting for the election of directors on that day, he filled no office connected with the bank till after his reelection as a director.

But admitting for the sake of argument, that he still continued president of the board of directors, I am of opinion that he could not as such be regarded as an officer within the meaning of the 16th sec. of the act, which prevents a cashier or other officer of the bank from acting as proxy for any absent shareholder in the election of directors.

It is provided by the 6th sec. of the act, that the directors chosen on the first Monday in June, shall at their first meeting choose out of their number a president and a vice-president, who shall hold their offices for the same period as the directors; and by the 12th sec. it is provided, that no director but the president shall receive any remuneration for their services; and the remuneration to the president is declared to be "for the purpose of securing to the corporation the undivided attention and services" of the person holding that station. Should the majority of directors be of opinion that the interests of the institution did not require "the undivided attention and services" of the president, they might appoint one to preside at their meetings, but with no other duties but those which belong to each director on his election, and they might withhold all remuneration for such services as he might render.

The fact of the president receiving a remuneration for giving his undivided attention to the business of the bank, cannot make him an officer of the institution any more than he would be without such remuneration, and he cannot in either case, as it appears to me, be regarded as an officer of the bank within the meaning of the statute. The stockholders are the parties entitled to elect directors of their affairs; these directors are then to choose from among themselves a person to act as their president. He still continues a director, and as such, with the other directors, appoints the officers and servants of the bank, and decides on the securities to be given by them.

It is clear, I think, under these circumstances, that he cannot himself be considered as one of the officers of the bank intended to be excluded from acting as proxy at elections for absent shareholders.

DRAPER, J.—Entertaining a clear opinion, that the president is not

an officer of the bank within the spirit and meaning of the 16th sec. of the act, I think that reason sufficient for discharging this rule. I have not felt satisfied by the argument, that the president and directors of the past year do not continue in office on the first Monday in June; on the contrary, were it necessary now to dispose of that question, I should hold that they were president and directors until the election of their successors. In addition however to the first reason stated by me, I may add, that looking at the affidavits, it appears that on the part of the application it is not denied that the great majority of the newly elected directors are properly elected; or rather there is nothing to shew that any others would have been returned or chosen, had the votes objected to not been received. I cannot find any reason or authority on which I could determine that this court could hold a scrutiny to ascertain, whether A. or B. shoul have been returned or chosen-nor that upon a suggestion that there is a doubt as to the election of one or two, the election of the whole fifteen should be annulled.

Per Cur .- Mandamus refused ..

TRINITY TERM, 12 VICTORIA.

Present—The Hon. J. B. Robinson, C. J.
The Hon. Mr. Justice Macaulay.
The Hon. Mr. Justice McLean.
The Hon. Mr. Justice Draper.
The Hon. Mr. Justice Draper.

DOE DEM. VERNON V. WETHERALL.

Before a witness in ejectment should be rejected as incompetent, the precise connection of the witness with the premises claimed in the action, should be shewn.

Ejectment for land in Whitchurch.

The only question was, whether a witness called by the defendant on the trial was admissible or not.

The lessors of the plaintiff claimed under a deed made to them in 1836, by James Kinsey—the defendant was a daughter of Kinsey, and attempted to invalidate the deed by shewing that her father, when he made it, was incapable from age and infirmity of mind of executing a deed. Kinsey lived eight or nine years after executing the deed; and before his death made a will, under which his daughter would take an interest in this land, if he had not before divested himself of the title by the deed to the lessor of the plaintiff.

The defendant called several witnesses, who gave evidence as to the state of mind of James Kinsey, before and at the time of executing the deed; and they called one Mathew Curry, who had married a daughter of Kinsey's, and also Curry's wife, to speak to the same points; but their testimony was rejected, the learned judge holding the wife to be incompetent from interest, because if the deed were found to be void, the will would take effect in her favour as to a portion of the land, and

he considered that the husband, on account of his interest through his wife, was also incompetent.

The jury found for the plaintiff,

Sherwood, Q. C., moved for a new trial on the law and evidence and for misdirection, and for the rejection of legal evidence. He cited 3 Q. B. R. 309; r B. & Ad. 439; 9 L. J., N. S. 32.

Gorham shewed cause, and cited 2 B. & Al. 554; 7 Phill. 90; 6 Beavan, 192; 5 Tyr. 458; 6 Bing. 561; 4 A. & E. 56.

ROBINSON, C. J., delivered the judgment of the court.

The will was not produced in evidence, and its contents are not known to us. We do not therefore see, whether the interest which Mrs. Curry held as a devisee, was a separate interest in a certain portion of this land, or whether she is tenant in common with her sisters of the whole estate.

It is for this reason not plain to us, whether the direct effect of a verdict for the plaintiff in this cause would be to deprive Mrs. Curry of a possession which the defendant may be holding on behalf of herself and the other devisees, being accountable to each for her portion of the rent and profit; or whether Mrs. Curry was held to be interested and therefore inadmissible, merely because a verdict establishing the will as to this defendant for one portion, would be determining a question which would shew Mrs. Curry to be equally liable to be dispossessed of her portion, if an action should be brought for that purpose.

Before we can be certain whether the witnesses rejected were admissible or not, we must know the precise connection which Mrs. Curry had with the premises claimed in this action. The objection to the witness should have been shewn to stand on sufficient ground, before effect was given to it.

We are of opinion that there should be a new trial, with costs to abide the event.

Per Cur.—Rule absolute for new trial, costs to abide the event.

McIntosh v. Demeray.

The deputy sheriff, having a ca. sa. to arrest a party, went to his house with the writ in his possession for that purpose—he told him of the process, and being assured that a friend of his (the debtor), who was then from home, would go his bail, he returned home and did not insist on the debtor coming with him.—Afterwards the sheriff went again to the debtor's house, and told him, without laying hands upon him, that he must come to his (the sheriffs) house, which he did—and remained there, but under actual constraint, till discharged; Held, per Cur., that under these facts—there had been no legal arrest of the debtor on the first visit of the sheriff—that the merely insisting upon the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest—but that the debtor in having gone to the sheriff's house as desired, and having remained there, though without constraint, till discharged—had been duly arrested.

In an action on the case for malicious arrest under a ca. sa.—it is sufficient for the plaintiff to aver in his declaration that the defendant maliciously sued out a ca. sa., when he had no reason to believe that the plaintiff had made, &c. He need not state that he (the plaintiff) had not

made a fraudulent conveyance, &c.

Case for malicious arrest, under a ca. sa.

The declaration charged that the defendant on, &c., not having then any reason to believe that the plaintiff had parted with her property or

had made any secret or fraudulent conveyance thereof in order to prevent its being taken in execution, but wrongfully intending, &c., made oath that he had reason to believe that the plaintiff had parted with her property, &c. or had made, &c.

It then averred, as usual, the maliciously suing out the writ of ca. sa. on a judgment in the district court, delivering it to the sheriff, and causing him to be arrested.

The defendant pleaded not guilty.

It was sworn by the deputy sheriff, that he arrested the plaintiff, as he considered, on the writ; that he went to her house for that purpose, and told her of the process; and being assured that a friend of hers who was then from home would go her bail, he did not insist on her coming with him; but on another day he went and told her she must come to his house, which she did, and remained there a short time, but not under actual constraint. He did not make an arrest of the defendant by laying his hands on her, but told her she must come to his house, and stay there till her friend should come, and she went there accordingly. No one was put in charge of her, but she remained there till discharged on an application to a judge in chambers on some ground of irregularity.

It was objected that there had been no arrest proved, and leave was reserved to move for a non-suit on that ground.

There was, as the learned judge thought, evidence of a want of probable cause for making the affidavit.

The jury found for the plaintiff, and 1s. damages.

Durand obtained a rule for a non-suit on the ground of want of sufficient proof of arrest; or to arrest the judgment because the declaration did not state that the plaintiff had not made a secret and fraudulent conveyance of her property, &c., but only that the defendant had not reason to believe that he had done so. He cited 3 Campb. 139; 6 B. & C. 528; 2 C. & P. 503, 605; 9 D. & R. 558; 16 L. J. 231; Exc. 11; Jurist 145; Part 1 Exch.

Eccles shewed cause, and cited Bull, N.P. 62; I.C. & P. 153; II Jur. 1021; IO Jur. 1062; I6 M. & W., 200; 4 B. & C. 247.

ROBINSON, C. J., delivered the judgment of the court.

We have had some doubt whether there was an arrest proved in this case, but upon consideration we think there was.

There was clearly no arrest on the first day, because though the officer had the process then with him, he did not execute it; he neither made an actual arrest, nor did he place the party under any restraint, nor insist on her accompanying him; he merely made a communication to her, and then went away leaving her at home and at liberty.

Then on another day he went again to her house, but he had not then (it would seem) any intention of arresting her, for he did not take the writ with him, he did not in fact arrest the defendant nor do anything that could be deemed equivalent; but he told her that as her friend who was expected to go bail, had not made his appearance she must come to his, the deputy sheriff's, house, and remain there till discharged.

So far as that goes, the effect would have been the same if the officer had written a note to her insisting on her coming to his house. There was no arrest thus far. But she did come to the deputy sheriff's house

as desired; he saw her and told her that she must continue there until discharged, which she sumbitted to do, and did remain till discharged.

By that conduct she submitted to being in custody under the writ against her, which the deputy sheriff held; and I think she was not the less in custody because the officer put no one in charge of her, and because he did not remain to watch her himself.

It seems that she might have gone away if she had pleased, and so the officer swore; but that would have been a violation of an understood engagement not to escape, and would have been an escape from a custody to which she had submitted.

Whichever way we might decide this, it would seem hard to reconcile the decision with some cases which have been determined; but we consider that the weight of authority, and the reason of the thing, are both in favour of regarding what was proved in this case as amounting to an arrest. If the sheriff, notwithstanding what had occurred, had afterwards returned "non est inventa," would not the return have been false? and would he not have been chargeable as for an escape if the defendant had departed from his house in his absence?

There was a restraint of liberty, and a damage in consequence; for as was said by Best, J., in Chinn v. Morris, 2 C. & P. 361, the defendant in the writ knew that if she did not go down when sent for, she would be compelled to go, and therefore she went voluntarily in one sense, but not in another; but being then in the officer's charge, and he in possession of the writ and of her person, it was an imprisonment, though he might not have guarded her strictly.

The cases of Wood v. Lane, 6 C. & P. 775, and of Simpson v. Hill, I Esp. C. 437, are inconsistent with holding that the plaintiff was under no restraint of her person while she was at the deputy sheriff 's.

As to the ground on which the defendant has moved to arrest the judgment, I am of opinion that the declaration is sufficient. The statute gives a plaintiff authority to sue out a ca. sa., upon swearing "that he has reason to believe that the defendant has made some secret or fraudulent conveyance of his property," and surely it must be sufficient prima facie to charge that a defendant maliciously sue out a ca. sa. when he had no reason for such a belief. Perjury would lie under such circumstances, whatever might be the fact unknown to the party suing out the writ.

I cannot see that on any principle it is necessary to aver that the debtor had in fact made no such secret conveyance; though if she had, and the other party could prove it, it ought to be taken, I think, as a strong, if not a conclusive, circumstance in the defendant's favour on that point, which is properly the issue, namely, the "reason to believe," since it is hardly possible to prove to a certainty that the plaintiff in the suit may not have heard of it, and as he could not give evidence on the trial, it would seem reasonable to assume that he did hear of it, and that he had therefore "reason to believe," &c.

I think the declaration in this case is sufficient, as charging that the defendant made the affidavit and sued out the writ, though he had no reason to believe that the debtor had fraudulently conveyed away the goods.

DOE DEM. LAWRENCE AND WIFE V. STALKER.

The plaintiff in an action of ejectment supported his title by proof of a deed given to him for the consideration of love and affection. The defendant proved his title by a subsequent deed from the same party for a valuable consideration—and then endeavoured to impeach the first deed as being voluntary, and on that account void as against him, a bona fide purchaser for value. The plaintiff then offered to repel this evidence, by calling witnesses to prove that the first deed was given for a real consideration beyond what was expressed in the deed. This was objected to by the defendant as going into a new case—and the learned judge rejected the evidence; but Held, per Cur.,—overruling the decision at nisi prius—that the evidence might have been received—the principle that a plaintiff should at once go into his whole case, not admitting of such a strict application in actions of ejectment.

Ejectment for lands in the township of Ernest-town-500 acres.

Both the plaintiffs and the defendant claimed under Charles A. Booth, who being owner of the fee, and residing on the land, on the 25th of September, 1832, made a deed conveying in fee simple to his sister, Harriet Booth, these premises, and nine hundred and fifty acres of other land. The instrument was a deed-poll, and was expressed to be made for the consideration of the love and affection which he bore to his sister Harriet Booth, and for divers good causes and considerations him thereto moving; and also for the further consideration of five shillings, which he acknowledged to have been paid to him by his sister at the delivery of the deed.

The grantee afterwards married one Doty, who died, and she is now married to Lawrence; her husband and she are the lessors of the plaintiff.

The demise was laid on the 1st of January, 1847, to hold for five years.

On the part of the defence it was proved by a witness who had prepared and witnessed this deed, that when it was given an action was pending against Charles A. Booth, for the seduction of a young woman; that the deed at the time was given to him, the witness, to keep for the grantee, and that it had always remained in his possession till the 10th of January, 1846, when she called upon the witness for it, in company with the defendant Stalker, who is married to her sister, and obtained the deed for the purpose of registration. It was not registered till that day. The grantee was then the widow of Doty, and not long afterwards married Lawrence. She and Stalker afterwards requested the witness to prepare a deed from Charles Booth to Stalker, of the premises now in question (the 500 acres in Ernesttown) which he did; but there being some blunder in the deed, he directed the parties to go to a lawyer, by whom a deed was drawn, which was executed on the 12th of May, 1847, from Charles A. Booth, to this defendant Stalker, conveying to Stalker in fee, the 500 acres in question in this action, for a consideration expressed, of £1000, which deed was registered the next day. On the same day that this deed was executed, Stalker gave to Charles A. Booth a lease of the land for a year at a rent stated in it of £60.

Charles Booth always continued in possession of the land, notwithstanding his conveyance to his sister.

The attorney who prepared the deed to Stalker, swore that he believed the transaction to have been *bona fide*, that some money was paid at the time, and a mortgage given by Stalker to Booth for the remainder, 9221.

The defendant having thus endeavoured to impeach the conveyance made to Harriet, as being voluntary, and on that account void as against him a bona fide purchaser for value, the plaintiffs desired to call witnesses for the purpose of proving that there was in fact a real consideration from Harriet Booth to her brother Charles A. Booth, for the deed made in 1832, beyond what was expressed in the deed. This was objected to, as going into a new case, and the learned judge ruled that it was inadmissible.

It was then objected by the plaintiffs' counsel, that as the deed to Stalker, on which he relied for defeating the plaintiff's title, was not made till May, 1847, the plaintiff had a good title in January, 1847, when the demise in the declaration was laid, and so was entitled to recover.

The consent rule and plea were of Trinity Term, 1847. This objection was reserved, and the case went to the jury on a direction, that if the deed to Harriet Booth was voluntary and without consideration, it must be held void as against the subsequent deed to Stalker, provided the jury found that the latter was made to a purchaser bona fide and for valuable consideration, otherwise the plaintiffs would be entitled to hold under the first deed.

The jury found for the defendant.

Smith, Q. C., and McKenzie, obtained a rule for a new trial on the law and evidence, and for misdirection, and for the rejection of proper evidence; they cited 8 M. & W. 405; 3 T. R. 274; 3 B. & Ald. 309.

Burrowes shewed cause, and cited 2 C. & P. 261; I Campb. 473; I Stark. C. 72.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that in refusing to allow the plaintiffs to go into evidence of a valuable consideration to support his deed, after it had been impeached on the defence on the ground that it was voluntary, the learned judge made a more strict application of the rule which requires a plaintiff to go at once into his whole case, than was necessary under the circumstances.

If this had been an action in which the record contained special pleas raising the issue, whether the deed to Harriet Booth was voluntary or not, then it might have been reasonable to hold that the plaintiff should at once have adduced whatever evidence was necessary to support his case on that issue; and that he could only, by way of reply, offer witnesses to repel evidence of particular facts attempted to be proved on the defence.

A good deal might, I think, depend on the precise way in which the plaintiffs opened their own case to the jury in the first instance. Prima facie the plaintiffs entitled themselves to recover when they proved a deed to Harriet Booth (now Lawrence) on such consideration as would support it until a subsequent deed to a purchaser for value was shewn, and the first deed impeached on the ground of fraud.

We grant a new trial, with costs to abide the event. If the plaintiffs

shall shew on another trial, that they were entitled to succeed, notwithstanding any thing which the defendant had it in his power to have proved, and should again obtain a verdict, then they will have the costs of both trials, which would be just.

In the event of another trial, it will be well to keep in view, in determining upon the effect of the evidence, the observations of the Court of Queen's Bench in England, in the case of Doe dem. Parry v. James, 16 E. R. 212.

Per Cur.—Rule absolute for a new trial, costs to abide the event.

DOE DEM. RUSSELL V. DAVID HODGKISS.

In an action of ejectment by the purchaser at sheriff's sale—where the only question was, whether the defendant, at the time of such sale, had possession under the execution debtor or not—the title of the execution debtor need not be shewn.

A. became purchaser at sheriff's sale, and had a deed made to him by the sheriff, on the 29th of September, 1845. B., the execution debtor, went into possession of the land sold, as devisee under his father's will, who died in 1835.—B., on the 28th of September, 1842, leased the land to C., for three years—who enjoyed it for a year—when B., the debtor, having absconded from the province, D., a brother of the debtor B., purchased out the tenant's interest and went into possession. Upon the tenant's quitting the place, he took from D. a written undertaking to save him harmless against B. B., in February, 1847, made a deed of the land to his brother D., who was then in possession, for the consideration expressed of 100%. This deed was registered in July, 1847. The sheriff's deed to A. was not registered. Held per Cur., in an action of ejectment brought by A. against D., that upon these facts—D.'s possession at the time of the sheriff's sale was the possession of B., the execution debtor, through his tenant, C., and that therefore A. was entitled to recover. Held also, that the non-registry of the sheriff's deed had no effect upon the title, it not having been shewn that the prior registered deed from B. to D. had been given for a valuable consideration.

Ejectment for the west half of 7, in the 8th concession of Leeds.

The plaintiff made title as purchaser at sheriff's sale, under a ft, fa at his suit in the district court of the district of Johnstown, against the lands of Alpheus Hodgkiss. The judgment was entered on the 1st of May, 1844—a ft. fa. against lands was issued on the 18th of June, 1844—under which this land was sold on the 1st of August, 1845, to the lessor of the plaintiff, and a deed made to him by the sheriff on the 29th of September, 1845, which, not having the date filled in, seemed to have been treated as insufficient; and on the 8th of July, 1847, the sheriff made another deed of the same land to the lessor of the plaintiff—neither of which deeds had been registered.

The land was bought by one Levi Hodgkiss, the father of Alpheus-Hodgkiss, from the patentee of the crown; and the deed given by the latter was registered on the 24th January, 1823—the day after it wasexecuted.

On the 21st of February, 1822, Levi Hodgkiss and his wife Elizabeth made a som of joint will, by which they devise to their son Alpheus (the debtor in the fi. fa.) the land now in question, in fee, "to be occu"pied and enjoyed by him directly after her decease."

The will was made before the land had been conveyed to Levi Hodg-

The will was made before the land had been conveyed to Levi Hodgkiss, by one Murtay, from whom he purchased.—Whether he had contracted for the purchase, or not, before he made his will, was not shewn.— The demise in this action is laid on the 9th of October, 1847—the widow of the testator died in August of that year.

It was proved that Levi Hodgkiss died about 1835, having been in possession as much as ten years—he left several sons, of whom two are older than Alpheus—but Alpheus went into possession of this land after his father's death; and on the 28th September, 1842, he leased it for three years to one Tomkins, who entered and enjoyed for a year—within which time Alpheus Hodgkiss absconded from this province, and then this defendant, David, his brother, purchased out the tenant's interest and went into possession. The tenant paid him the rent he was to have paid Alpheus, and upon his quitting the place took from him a written undertaking to save him harmless against Alpheus Hodgkiss.

The suit against Alpheus Hodgkiss had been commenced by attachment issued against him as an absconding debtor, on the 4th of March, 1843.

On the 20th of February, 1847, Alpheus Hodgkiss made a deed of this lot in fee to his brother, the defendant, David Hodgkiss, for the consideration expressed of 100/.: which deed was registered on the 8th of July, 1847. This defendant, David Hodgkiss, was in possession at the time of this deed being executed, having continued in possession since he bought out the interest of his brother Alpheus' tenant.

On the part of the defendant, it was objected that Alpheus Hodgkiss, the execution debtor, was not shewn to be entitled at the time of the sheriff's sale.

2ndly. That the sheriff's deed had not been registered.

The plaintiff, on the other hand, relied on the point, that the execution debtor must be looked upon as being in possession at the time of the sale, for that David Hodgkiss, from the manner in which he acquired possession, could no more dispute the title, under the sheriff than the debtor could; and that the deed from Alpheus to David Hodgkiss was evidently voluntary, and made in order to defeat the creditor's execution.

The jury found for the plaintiff, with leave to move to enter a verdict for the defendant—if on the evidence a defence had been established, or the plaintiff not entitled to recover.

Smith, Q. C., of Kingston, obtained a rule for a nonsuit on the points reserved, and upon the ground that the judge improperly allowed the plaintiff to go into evidence of the will after his case had been closed, and after the defendant had objected that he had shewn no interest in Alpheus, the debtor. He cited I Starkie, 72; Doe Nellis v. Matlock, 4 U. C. R. 489.

Richards shewed cause. He cited Doe Mills v. Mills, 2 U. C. R. 26; 4 U. C. R. 390; Jarman on Wills, 726.

ROBINSON, C. J., delivered the judgment of the court.

Upon the point that the plaintiff was allowed at the trial to go into evidence of the devise to Alpheus Hodgkiss, by his father, after he had opened a case upon the title of Alpheus, as heir—there is no reason why we should interfere with this verdict—because, as the case stood upon the evidence, all that was necessary to entitle the purchaser at sheriff's sale to recover, was to shew that the defendant in the fi. fa., Alpheus Hodgkiss, was in possession himself, or by his tenant or servant, at the time of the sale, and that the defendant in the ejectment was to

be regarded as holding under him. The title of the defendant in the fi. fa., need not in such a case be shewn.

Now here, when the sheriff's sale took place, it was this defendant, David Hodgkiss, who was in possession; but his possession was acquired by collusion with Tomkins, the tenant of Alpheus, who held a term under the latter—and it is clear on the evidence that he took that interest, either with the intent of supplanting his brother in his absence, who could not make title as heir, not being the older brother, and whose title under his father's will was probably considered as infirm, from the circumstance that the land was not vested in the father at the time of making his will—or that he took the deed in order to enable him, on behalf of his brother Alpheus, to hold possession of the estate and protect it against creditors.

From his giving Tomkins a written engagement to hold him harmless against Alpheus Hodgkiss, we might infer that he was conscious, as well as the tenant, that they were combining to take an unfair advantage of the latter, and were doing an act which he might be disposed to complain of.

It is true that afterwards, with a view apparently to cut out the sheriff's deed, Alpheus Hodgkiss seems to have been willing to waive any ground of complaint on account of his brother David being thus let into possession, for he made a conveyance to him of the premises in fee—but that was at a time when he had no longer any real interest in the property, for the sheriff's sale had taken it from him, unless he could by some contrivance defeat that sale.

The deed made to David seems to have been a contrivance for that purpose—but it fails of its effect, because we must look at the matter in the first place as it stood at the time of the sheriff's sale, when we are to regard the debtor as being really in possession, for the assignee of his tenant was in fact possessed—and in the next place, when David Hodgkiss, in February, 1847, took a conveyance of the land from Alpheus, he thereby recognized his title up to that time—and of course whatever interest Alpheus held at the time of the execution coming to the sheriff was bound by that execution and was transferred by the sale.

That brings it to the question upon the effect of the non-registry of the sheriff's deed and of the registry of the deed of Alpheus Hodgkiss to David Hodgkiss, on the 8th of July, 1847.—(See Sugden's V. & P. 3 vol.)

If the deed from the sheriff to the purchaser, at the sheriff's sale, could be held fraudulent and void under the 2nd clause of the Registry Act, which point we have had occasion incidentally to consider in a late case of Doe dem. McCrimmon v. Moffatt, still it was not shewn, at the trial of this cause, that David Hodgkiss was a purchaser for valuable consideration, and there was great reason for believing that he was not.

In order to entitle the party claiming under a subsequent deed to priority by reason of the non-registry of the earlier conveyance, he must shew himself to be a purchaser for value (16 E. R. 212)—Doe Major v. Reynolds, 2 U. C. R.—the evidence here all tended to prove the contrary. We are therefore of opinion that the defendant did not shew such a title as could be allowed to prevail over that proved on the part of the plaintiff, by force of the Registry Act, and therefore that this rule should be discharged.

Per Cur.-Rule discharged

DOE DEM. MOFFATT V. SCRATCH ET AL.

Where A. in the actual possession of land as owner, claiming the fee, gives a mortgage to B., who assigns to the lessor of the plaintiff.—a deed given by the heir at law of a former owner to the defendant while out of possession, and subsequently to the mortgage—is void—as against the common law and the Statute of Maintenance.

Ejectment for lot number No. 2, 1st concession of Gosfield.

The crown granted this land to Leonard Scratch now deceased, The defendant John, was a son of his. Leonard and Theodore were sons of the defendant John Scratch.

On the 3rd July, 1838, John Scratch, one of the defendants, made a mortgage of this land to one Horatio Nelson, who assigned the mortgage to the lessor of the plaintiff. John Scratch was proved to have been residing on the property for twenty-four years past, in a house which the patentee, his father, had built. The father resided also on the same land till he died, which was about nineteen years ago.

On the part of the defendants, it was endeavoured to be shewn that John had in fact no title when he made the mortgage under which the lessor of the plaintiff claimed.

It appeared in evidence, that Leonard Scratch, the patentee, made his will in 1822, in which no mention was made of this land, and it contained on residuary devise which could include it. A codicil was added shortly before his death in 1829.

The plaintiff contended that this omission of all reference to this land, which was part of the homestead on which Leonard Scratch and his son John (the defendant) resided, was strong proof of what they endeavoured to establish, that he had in his life time made a deed to John of the land, under which deed John was seized when he made the mortgage to Nelson. Whether any such deed had been made or not was the fact to be investigated at the trial. The eldest son and heir of the patentee, was Peter Scratch; he was called as a witness, and swore that he knew nothing of any deed having been made to John Scratch; but that as it was well understood in the family that the property was to go to John, and as there was no devise of it in the will, and he could not learn that any deed had been made by his father to John, he, as heir of his father, made a deed to Leonard, the defendant, as the son and heir of John, the other defendant, though John was still living. He did not swear that he made this deed to Leonard by the request or with the sanction of John Scratch, but merely that he did it because Leonard had worked upon the place, and knowing that the property was intended to go to his brother John. He thought fit, as heir, to remedy the omission in the will of their father, by making a deed to his brother's son. He admitted, however, that he knew that the land had some time before been sold under a writ of execution by the sheriff, as being the estate of John; and the suspicion would necessarily arise that he combined with his brother, or his family, to vest the title in the defendant, Leonard, to the exclusion of those claiming under the mortgage or judgment, whose interest he might suppose would be confirmed, if he had made the deed to John himself.

It was proved that old Leonard Scratch, the patentee, had made deeds to his other sons, and there was some evidence which would lead one to think that Peter Scratch was conscious that a conveyance had been made by his father, in his life-time, to John Scratch, but wished the fact to be concealed.

The defendant, Leonard Scratch, had been always living on the land with his father, John Scratch, never pretending any right to it, till the deed was made to him by Peter Scratch as heir, and John Scratch carried on the farm as before, assisted by the labour of his two sons, the defendants. The deed was a mere quit claim deed, and was made on the 5th of February, 1844, and upon this the defendants relied for shewing title out of John Scratch.

At the time of the patentee's death, his son John (the defendant) was living on these premises, in a different house from that in which the father lived, on the same land; he had occupied it continually for twenty-three years before the trial, living separately from his father since two years before the death of the latter, but carrying on the farm apparently under his direction. He was living upon the land in 1838, nine years after his father's death, when he executed the mortgage to Nelson—and it was in 1840 that the land was sold as John's by the sheriff under a fi. fa.

Peter Scratch had never advanced any claim to the land between his father's death, in 1829, and February, 1844, when he assumed to convey to the defendant, Leonard, as representing his father John, who was still living.

The learned judge, upon this evidence, left it to the jury to presume that the patentee had conveyed these premises to John (as he had made deeds of other lands to all his other children), and as any such deed must have been made before the mortgage given by John was executed, three years after the patentee's death, it would of course support the mortgage.

The jury not being satisfied that a conveyance had been made to John found for the defendants; leave being reserved to move to enter a verdict for the plaintiff as against John Scratch, if that should be thought right, as he could not be allowed to deny his own right to make the mortgage.

Wilson obtained a rule to enter such verdict, or for a new trial against all the defendants, on the ground of the verdict being against evidence.

Crickmore shewed cause.—(no cases cited.)

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the rule should be made absolute for a new trial, with costs to abide the event.

The evidence shewed that John Scratch was in actual possession when he made the mortgage through which the lessor of the plaintiff claims, and he must therefore be looked upon as being then in actual possession openly as owner claiming title. That was sufficient prima facie to support the title advanced under his mortgage, and it threw upon the defendants the burthen of shewing a better title in themselves, or in some other party. What was shewn was a deed, clearly voluntary, made by Peter Scratch to Leonard, the son of the defendant John, at a time when John Scratch was in actual possession as owner claiming the fee.

If Peter Scratch made this conveyance with the sanction and connivance of John, then the evidence leads almost irresistibly to the conclusion, that it was done for the fraudulent purpose of defeating the remedy of creditors who had had their land sold under executions against John Scratch; if it were not done in any privity with John-then the deed given by Peter Scratch would be void, both at common law and under the Statutes of Maintenance, as being made by Peter when another was actually seized, and when he was himself out of possession.

Per Cur.-Rule absolute for new trial, costs to abide event.

SHAW & SHAW V. VANDUSEN.

Held, per Cur., upon the following guaranty:-

"Messrs. A. & D. Shaw.
"Gentlemen,—"I have just received a line from Mr. Lyman A. Ferris, "informing me that he wishes to purchase goods from you. Being ac"quainted with his circumstances, and knowing him to be a man of pru-

"dence and integrity, I do not hesitate to be responsible to you for £150

"or f.200 worth of goods should he require that amount"-

That it was not a continuing guaranty, and was not applicable to the purchase of goods by Ferris and a Partner, but to the purchase of goods by Ferris alone.

The plaintiff sued the defendant in assumpsit.

1st count was upon a guarantee averred to be given by the defendant,. that if the plaintiff would sell to one Ferris, on credit, £150 or £200 worth of goods, should he require that amount of the plaintiffs in the way of their business, he, the defendant, would be responsible. The plaintiffs averred that, confiding in that promise, they did sell and deliver goods to Ferris, on certain credit agreed upon between them, to the amount of £200, and that Ferris refused to pay for them when due, of which the defendant had notice.

A count was added for goods sold and delivered to the defendant.

The defendant pleaded, 1st, Non-assumpsit.

andly, To the first count, that the plaintiffs did not sell and deliver the said goods or any part thereof to Ferris, as in the first count alleged.

3rdly, To the first count, that the plaintiffs did not sell the goods to Ferris alone according to the agreement, but to him and one Sinclair, partner with Ferris, contrary to the agreement, and without the defendant's consent.

4thly, Payment by Ferris.

5thly, Payment by defendant.

The plaintiffs took issue upon the 1st, 2nd, 3rd, 4th, and 5th pleas; and replied to the 3rd plea "that they did not sell and deliver the goods to "Ferris and Sinclair, partner in business with Ferris, contrary to the agree-"ment and without the defendant's consent," as stated in the plea.

The defendant lived at Picton—the plaintiffs and defendant in Kingston, On the 17th of November, 1845, the defendant wrote this letter to the plaintiffs, which was the guaranty sued upon .-

23 (to $23\frac{1}{2}$).

" MESSRS. A. & D. SHAW.

"Gentlemen,—I have just received a line from Mr. Lyman A. Ferris informing me that he wishes to purchase goods of me. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods, should he require that amount."

The plantiffs, in their particulars, claimed for goods sold, on the 18th of November, 1845, to Ferris, to the amount of £206 4s. 1d.; on the 3rd of December following, to the amount of £10; on the 9th of May, 1846, £22 19s. 7d.; and on the 1st and 13th of August, 1846, £14 2s. 2d.

It was proved that Ferris, who is a son-in-law of the defendant Vandusen, had just before the guarantee was given been in treaty with Sinclair to enter into partnership with him. Ferris had not before been in business, but Sinclair had been; and had at different times got goods of these plaintiffs on his own credit. It was to depend upon the possibility of Ferris obtaining credit from the plaintiffs for goods, to the amount of about £200, whether he and Sinclair should go into partnership or not; and on Ferris applying to the plaintiffs, he was told that they would not credit him, unless he could obtain the defendant's undertaking to become responsible. He therefore wrote to the defendant from Kingston, and obtained the letter in return, on which the defendant was now sued.

It was not shewn that the defendant was in any manner privy to Ferris intention to enter into partnership, or that he had any knowledge of Sinclair. On the 18th of November, Ferris having received the defendant's letter, went with it in company with Sinclair to the plaintiff, and obtained, upon producing it, goods charged in the invoice to Ferris and Sinclair at £206 4s. 1d. Two days after Ferris and Sinclair gave two promissory notes to the plaintiffs for the amount; one for £100, payable in four months; the other for £106 4s. 1d., payable at six months.

On the 3rd of December, Ferris and Sinclair made another purchase of goods from the plaintiffs, which plaintiffs charged in the same way to Ferris and Sinclair.

On the 8th of April, 1846, Ferris and Sinclair dissolved partnership; and on the 9th of May, and 1st and 13th August, 1846, Ferris bought goods of plaintiff, which were charged to him alone, amounting together to £37 1s. 9d.

On the 13th of August, Ferris paid the plaintiffs £50, and took their receipt thus: "Received from Mr. L. A. Ferris, £24 15s. in cash, and note of John Grier for £25 5s., in all equal to £50.

It was explained to the jury that this acknowledgment of a sum received from Ferris did not necessarily and certainly import that he had paid that money in discharge of his sole account only, and not on the account for which he and his late partner were liable, and it was left to them to consider whether, under all the circumstances, it was to be imputed as a payment on the particular account of Ferris alone or not—if not, then the receiver of the money might appropriate the payment as he pleased.

The jury found for the plaintiffs, £37 is. 9d., being the full amount

of the goods sold in May and August, 1846, to Ferris alone, after the dissolution of the partnership; being directed by the Chief Justice that for the goods sold to Ferris and Sinclair, in Nov. and Dec. the plaintiffs could not recover, because they had declared as for goods sold to Ferris alone, and could only recover for such upon the issues raised. The learned judge also intimated, that such sales did not come under the guaranty, and that the defendant could not have been made liable for them by any mode of declaring.

Upon consideration since the trial, the plaintiff's counsel assented to this, and conceded that they were not entitled to recover for the goods sold to Ferris and Sinclair—the only question was, whether the plaintiffs could properly recover for any thing; the defendant denied that they could.

Smith, Q, C., of Kingston, moved for a new trial, or to enter a verdict for the defendant on the leave reserved, and cited Addison on Contracts, 168, 279; 3 B. & Ald. 593; 2 B. & C. 934; 3 Camp. 220.

McKenzie, of Kingston, shewed cause, and cited Ross v. Burton, 4 U. C. R. 387; 12 E. R. 227; 3 Camp, 220; 6 Bing. 244; 2 Tyr. 86; 6 M. & W. 605; 2 M. & S. 18; 3 Tyr. 164; 5 M. & G. 392.

ROBINSON, C. J., delivered the judgment of the court.

The case presents several questions on which there has seemed to be room for doubt. There was no previous account—no course of dealing between Ferris and these plaintiffs—but a request on a particular occasion to be credited with a certain amount of goods, which was refused to him on his sole credit, and a suggestion made by the plaintiffs that he should see whether this defendant, his father-in-law, would become answerable for the amount of the desired purchase. Ferris then applied to the defendant and obtained his letter, which is not an engagement for any goods which he might buy of the plaintiffs to an amount not exceeding 200l., on which word any much stress has been laid in some cases, but it is a simple assent to a particular request made with a view to a proposed purchase of goods. Ferris takes it the very next day to the plaintiffs, who influenced by it, as I have no doubt they were, and trusting to it, sold at once goods to rather more than 200l., to which the guaranty was limited (if it had been applicable at all.)

It appeared to me, that this was not, under such circumstances, a continuing guaranty; but was an undertaking given on a particular occasion, and *pro hac vice* only; not meant to back a running account, so as to be always ready to answer a balance against Ferris of 2001.

The defendant in his letter speaks of his confidence in Ferris's circumstances; that is, his then circumstances. He speaks also of his prudence and integrity, and he was willing with reference to those circumstances and his individual character "to be answerable for 150l. or 200l. worth of goods, if he should require that amount."

Then Ferris entering into a partnership with Sinclair, who had formerly been a customer of these plaintiffs, without the knowledge, it is said, of the defendant, and obtaining this guaranty expressly for the purpose of enabling him to enter into that partnership, yet not disclosing that circumstance to the defendant, makes use of the guaranty given, as appears with one view, to serve his purposes with another, and the effect would be to make this defendant answerable for Sinclair's cir-

cumstances, prudence and integrity, of whom, for all that was shewn, he knew nothing, as well as for his son-in-law's.

It need not be said how completely it is in the power of one partner, by want of discretion or integrity, to ruin another. The case of Wright v. Russell, 2 Bl. Rep. 936, is a strong one to shew what decisive importance the courts attach to such a change of circumstances as affecting a security given with a view to a different state of things, and other cases might be cited, but it is unnecessary, because the right to recover for the goods sold to the two is not insisted on, and the question is whether the guaranty can be made use of to cover the small parcels of goods sold afterwards in May and August, 1846, to Ferris alone, the dissolution having taken place in April.

In my opinion it cannot, for although it was not in one sense exhausted by the sale to Ferris and Sinclair, because for that sale it is admitted, that this defendant is not liable upon it, yet in this sense it is exhausted, that the plaintiffs looking to it as a security, gave Ferris credit for an amount rather exceeding it, which credit they had refused to him on his sole responsibility, not considering him, as we may suppose, able to answer for such an amount from his own resources. effect of what they so did was to burden his credit and his resources to that extent; looking to the guaranty and intending to hold the defendant liable upon it, they did give credit to Ferris to the full amount contemplated, and thereby rendered him to that extent less safe to be trusted in regard to further advances. And though by their manner of acting on the guaranty the plaintiffs have deprived themselves of the security which they thought it would afford, it does not therefore follow that they are at liberty afterwards to sell to Ferris other goods to the amount of 2001., or to any amount on the defendant's liability.

We are not warranted in concluding that the defendant would have engaged himself in the same manner for Ferris after he had taken a partner, and in conjunction with him incurred a debt of 2001. and failed in business. It was under those circumstances that the plaintiffs sold the goods in May and August, and after they had, as they sup-

posed, used the guaranty already to its full limit.

It was the plaintiff's own act in selling to the firm, and not to Ferris alone, which disabled them from holding the defendant liable upon that sale; and if by an act of another kind, they had lost the benefit of their security unintentionally, it could not therefore follow that they could take it up again and apply it to other circumstances; as for instance, if this guaranty had been given only upon condition of certain terms as to credit or otherwise being allowed by the plaintiffs to Ferris, and if the plaintiffs had departed from those terms, trusting that the defendant would nevertheless adhere to his guaranty, they would no doubt have thereby deprived themselves of any recourse on the defendant in regard to that transaction; but it would not therefore follow that the plaintiffs could treat the guaranty as still open, and be at liberty to give a further credit to Ferris, for which they could hold this defendant liable.

There is besides, this further difficulty, that if by the change of circumstances, affecting Ferris' credit, not only known to the plaintiffs, but which they helped to create, the guaranty was during any period no

longer binding, it could not be revived again and made a binding contract, because the partnership happened to be dissolved.

A transaction exactly similar to to the present may not have occurred before and we could therefore hardly expect to find express decisions in point; but upon principle, and in reason, I think the plaintiffs could not apply the guaranty to the sales in 1846, and I dare say that they did not at the time imagine that they could.

The case was so reserved at Nisi Prius by consent of parties as to allow of a verdict being entered for the defendant, if the court should think the plaintiffs not entitled to recover for any amount upon the evidence.

If it could be any advantage to the plaintiffs to have a non-suit entered instead, that might be ordered; but the rule is for a verdict to be entered for the defendant, and the plaintiffs lose nothing by its being put in that shape, unless they could have proved a different case on another trial.

Per Cur.—Rule absolute; verdict to be entered for the defendant. .

REGINA V. THE DISTRICT COUNCIL OF THE DISTRICT OF GORE.

Semble, that under the Acts 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, the warden of a district council may be granted by the council a salary as warden.

Semble also, that this salary, if granted, must be by a by-law regularly passed and not by a vote or resolution merely.

Upon an application by two members of the Municipal Council of the district of Gore for a mandamus to the warden, commanding him to repay to the treasurer of the district a sum of money he had received from the council as a salary for his services as warden: Held per Cur., that the mandamus must be refused, the parties applying having no particular interest in the matter.

Cameron, Q. C., obtained a rule upon the Warden of the Municipal Council of the District of Gore, to shew cause why a writ of mandamus should not issue to him, commanding him to repay to the Treasurer of the District of Gore the sum of rool. illegally received by him as a salary, under a resolution of the municipal council, passed on the 4th of November, 1847.

The rule was moved on affidavits made by two members of the municipal council, setting forth—that they were inhabitant freeholders of the district and duly qualified to sit as members of the council and to vote at election of members—that the resolution in question was passed by the council in "the following terms: "Resolved, that the treasurer be authorized to pay "over to the warden the sum of 100%, to meet his contingent expenses for the current year in attending to the duties of his office, which had been so "efficiently and faithfully performed with great credit to himself and ad" vantage to the district "—that they protested against the passing of the resolution as being illegal, but that the treasurer paid the sum to the warden—that they did afterwards call upon the warden to refund the ssme to the treasurer, which he refused to do.

Mr. Cameron referred to the several clauses of the acts 4 & 5 Vic.

ch. 10, and 9 Vic. ch. 40, bearing upon the application; and cited 4 A. & E. 286.

P. Vankoughnet and M. Vankoughnet, of Hamilton, shewed cause against the application, and cited 5 T. R. 550; I. P. & D. 75; I. A. & E., N. S., 288; 6 A. & E., N. S., 70; I. Jur. 981; 4 Bligh. N. S. 313; 7 Bing. I; 4 B. & A. 781; 3 B. & Ad. 125; 13 L. Jl. 107, Q. B.; 8 Jur. 213; 7 Jur. 373.

ROBINSON, C. J.—I am of opinion that we cannot properly interfere in this case by mandamus upon the application of parties, neither having any particular interest in the matter, nor standing in a position which makes it in any especial manner their duty to see that what is right is done.

Upon that point the case of The Queen v. Frost, r P. & D. 79, is an authority for holding that such an application can only be made by some properly authorised party.

For this reason alone we should be obliged to refuse the writ on these affidavits. If, in paying away the funds of the district in the manner complained of, the members of the district council were guilty of malversation in their office, they may be found to be subject to prosecution by information or indictment.

But, for my own part, though it is not necessary to determine the point, and I shall therefore give no opinion at present which I shall not be at liberty to depart from, if the same question should hereafter come before us in such a manner as to make it necessary to decide it; yet I have no objection to say that it appears to me to be a reasonable and not an improper construction of the 39th clause of the 4th and 5th Vic. ch. 10, to hold that the warden to be appointed under the 3rd and 4th clauses of that act was a district officer within the 39th clause, to whom a salary or other remuneration might be assigned by the district council, under the authority of that clause. He could not come within the 50th clause, which prohibits the giving any allowance to a councillor, because he could not be a councillor so long as that act was in force.

I see nothing else in the first statute, 4 & 5 Vic. ch. 10, which bears upon the question.

Then does the late act 9 Vic. ch. 40, furnish a clear ground for holding that if a salary might have been legally given by the district council to the warden before the passing of that statute, yet that none can now be legally given? It does not strike me at present that we could hold that. The latter statute, it is true, no longer leaves the warden to be appointed by the government, but makes the office elective and empowers the councillors to choose one of their own number to be warden.

We can therefore no longer say that he is appointed under the authority of the 4th & 5th Vic. ch. 10, and so he does not literally come under that head of the 39th clause of that act, which respects salaries to district officers to be appointed under the authority of that act; but I apprehend it would be too narrow a construction which should hold that under that 39th clause no salary could be given to the warden, merely because he is now appointed not under that statute alone, but under an act altering and amending it

The two acts must now (for such a purpose at least) be taken together as one statute, and we should look at the warden as an officer appointed under the first act, which creates the office, amended as it has been by the act of 9 Vic. The office, its powers and duties, still depend on the former act—it is only the mode of appointing the individual to it that is altered. The 6th clause of the 9th Vic. assists this construction materially.

The next question is, whether the 50th clause of the 4th & 5th Vic. ch 10. has the effect of disabling the warden from receiving any emolument from his office? At present, I should say not. For a salary given to him as warden would not be a salary "for his services as councillor, nor by reason of his being such a councillor, but by reason of his being warden; as the speaker in a provincial assembly, usually received a salary, when as a member of the assembly, he was not authorized to receive any wages. The 3rd clause of the latter act applies merely, I think, to councillors, and not to the warden any further than respects his office of councillor.

Then it would be necessary to determine whether, if a salary or other remuneration could be granted by the district council to the warden, it must not be granted by a by-law regularly passed; and not as has been done in this case, by a vote or resolution merely. And my opinion at present is, that they can grant the money for such a purpose by by-law only. which must, like other by-laws, be sanctioned by the government.

DRAPER, J.—This rule must be discharged, for there is clearly no case for a mandamus, and there are defects in the application also. In that respect I concur in the opinion delivered by the Chief Justice.—I Per, & Dav. 79.

I have also a very strong opinion that the only proper and legal mode of appropriating monies belonging to the district is by by-law, and that a resolution only is no sufficient warrant or authority to discharge the treasurer; and that the district auditors would only be doing their duty to disallow any such payment made by him, and not sanctioned by a by-law.

I express no opinion to the power of the district council to pass a by-law for the purpose contemplated in this resolution, or to give the warden a salary. Admitting, however, that they have the power and may exercise it, subject to disallowance of their by-law by the executive government, it is a reason, a *fortiori*, why they should do it by resolution.

Such a course would be a manifest evasion of the controlling power over their by-laws given by the 47th sec. 4 & 5 Vic. ch. 10.

MACAULAY, J., and McLEAN, J., concurred.

Per Cur.-Mandamus refused

NEWHORN V. LAWRENCE ET AL.

Held per Cur., that the following instrument, "Ten days after date, we pro"mise to pay M. Newhorn the sum of 83%. 15% od. for value received"—
upon which was endorsed, at the time the note was given, the following
memorandum: "It is agreed that this note is to be paid by a lawful mort-

"gage, with interest on the same, having three years to run"—could not be sued upon as a note between the *original* parties, and could not be given in evidence under the count on an account stated.

Quare.—Would it be a note in the hands of an indorsee who took it as a note

for value?

The plaintiff sued as payee of a promissory note for 83l. 15s. od. payable in ten days after date, for value received.

On the back of the note was written this memorandum, not signed, but admitted to be written at the same time as the note: "It is agreed that "this note is to be paid by a lawful mortgage, with interest on the same, having three years to run."

The plaintiff was allowed to recover, though it was objected that the writing was not a promissory note by reason of the condition endorsed, which must under the circumstances be read as part of the instrument, and which shewed it not to be an undertaking to pay money.

Geo. Duggan moved for a new trial on the law and evidence, and cited 2 Camp. 205; 4 M. & S. 25.

Bell shewed cause, and cited 3 A. & E. 669; 2 B. & Ad. 554; 7 M. & W. 232; 4 Camp. 127.

ROBINSON, C. J., delivered the judgment of the court.

In Leeds v. Lancashire, 2 Campb. 207, Lord Ellenborough intimated that an objection of this kind might apply in an action between the original parties, when it would not in case of the note being transferred for value to an indorsee, who took it as a note. It is not necessary to consider here how far the question, whether the instrument sued on as a note is in law a note or not, can be affected by that circumstance, because in this case the question arises between the original parties.

The indorsement being expressed as an agreement, and being admitted to have been written on the note at the time it was given, we cannot look on it as a mere declaration of an intended courtesy or indulgence by the payee, but being contemporaneous we must regard it as forming part of the note, and being a modification of the terms of it; and then the promise amounts to this: "Ten days after date, we promise to pay to "M. Newhorn the sum of 831. 1551, by a lawful mortgage, with interest on the same, having three years to run, for value received," which is not a promise to pay in money, but to pay in a mortgage.

I am of opinion, that such a writing is not a promissory note, but a special agreement, on which alone the defendant is liable to be sued, and that it cannot be made use of to enable the plaintiff to recover as upon an account stated of money payable in ten days, because that would be inconsistent with the agreement of the parties.

Per Cur.-Rule absolute.

MILLS V. SCOTT.

In an action by a patentee against a defendant, for an infringement of his patent, upon an order being made by a judge in chambers that the defendant should deliver to the plaintiff particulars of any objections on which he intended to rely in support of his plea—that plea being, that the invention was not new, but had been wholly and in part practised, used and vended in Great Britain, &c., before the grant of the patent; Held, per Cur., that a

notice delivered by the defendant to the plaintiff, that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention—was sufficiently particular, and a compliance with the order.

In this case *Crooks* moved, for the defendant, to rescind all the orders of Mr. Justice McLean, requiring him to give particulars of his objections to the plaintiff's patent, and that the defendant may be relieved from the said orders, and from compliance therewith.

The plaintiff declared, setting forth that he was the original inventor of a new and useful mode of generating and distributing heated air in and about dwelling houses, and for producing any temperature required in the several apartments; and that on the 1st of September, 1846, he obtained a patent for the invention, under the great seal of this province, to be in force for fourteen years; and he charged that the defendant, on the 10th September, 1846, and on divers days, &c., since, unlawfully imitated the invention in part, and used and practised the same, &c.

The defendant pleaded, 1st, Not guilty.

2ndly, That the defendant was not the true or first inventor, &c.

3rdly, That the invention was not new, but had been wholly and in part publicly and generally practised, used and vended, viz.—in Great Britain and Ireland, and in the German States of Europe, and in Russia, and the United States of America, and in this province before the grant of the said patent, viz. on &c., by reason whereof the patent was and is void.

The plaintiff took issue on the 3rd plea.

On the 10th of April, 1848, Mr. Justice McLean ordered that the defendant should deliver to plaintiff particulars of any objections on which he intended to rely in support of his pleas.

On the 21st of April, 1848, the defendant delivered a notice, that he would shew that the invention was used in Canada, and in the United States of America, before the patent; and in other countries named.

On the 25th of April, an order was made for further particulars, and on the 1st of May the defendant gave notice, that he would prove that the invention was used in Montreal, Toronto and Kingston, and in Dundas and St. Catherines in Canada, and in other towns abroad named.

On the 3rd of May, a judge's order was made for full particulars of all the objections on which he intended to rely in support of his pleas.

The defendant gave notice that he intended to object on the trial to the patent altogether, as being granted for what was not a new invention.

ROBINSON, C. J., delivered the judgment of the court,

Our Statute, 7th Geo. IV., ch. 5, does not contain any provision such as that in the imperial act, 5 & 6 Wm. IV., ch. 83, respecting the giving notice, and the orders in this case I suppose were made under the general practice of the court.

The question raised is, whether they call for more than the defendant ought to be required to furmish.

I understand from the state of proceedings before us, that the defendant does not mean to admit that the invention is in any part new; but insists that it is altogether an old discovery, something that had been practised before.

In his plea he avers, that it had been wholly and in part practised in divers places, &c.; and if he meant to retain the right to shew that as to some parts of the contrivance the invention was new, then it would seem that he ought to have given notice what are the parts which he undertakes to shew were in use before; but I understand that by this last notice delivered, the defendant objects to the patent as being an invention altogether old.

In this case he will not, I suppose, be allowed under such a notice to insist that a part of it merely was not new.

The case of Russell v. Ledsam, 11 M. & W. 467, seems certainly to be a decision on a deliberate review of previous authorities, which shews that the plaintiff has no right to call on the defendant for a more particular statement than has been given here of the persons who had used the same invention before the patent issued.

The notice given in compliance with the judge's order of the 25th of April seems to be sufficiently particular, and I think if we take the order of the 3rd of May to be intended to require notice of any particular part of the invention intended to be objected to as old, that the particulars delivered under it, in which the defendant says that he will object to the patent altogether as being granted for what was not a new invention, may be considered as complying with that order. If this view could safely be taken of the intention of that last order, then it might stand: if it must be looked upon as calling for a statement of persons who used the invention, then it should be rescinded,

It is difficult to say, that we can have any ground for rescinding orders which have been acquiesced in; since the last one was made, the defendant has given a notice which would be complied with if we are to suppose that by fuller particulars the learned judge meant, only as he informs us he did, that the defendant should state explicitly whether he meant to object to parts only of the invention not being new, and if so then what part. The defendant answers it by saying: I mean to prove that no part of it was new.

If the plaintiff is not satisfied with this, and demands to know who has used it, and when and where, then it is open for him to apply for that statement: in answer to which he should, I think, be told that this is information which the defendant is not bound to give him.

THE BANK OF MONTREAL V. DELATRE.

Held, per Cur., upon the following bill and acceptance:-

" Montreal, July 9, 1847.

" £225 18s. 1d.

"Three months after date pay to the order of Alexander Simpson, "Esq., Cashier of the bank of Montreal, two hundred and twenty-five "pounds, eighteen shillings, and one penny, currency, for value received."
(Signed) "The Coalbrook Dale Company, "per Philip Holland."

"To P. C. DeLatre. Esq.,

"President Niagara Dock and Harbour "Company, Niagara, C. W.

The bill was accepted thus in writing:

"Accepted payable at the office of the Bank of Upper Canada, Niagara." "P. C. DeLatre, (Signed) "President, N. H. & D. Co."

That—in an action brought by the payee (the Montreal Bank) against the acceptor personally—the acceptor had rendered himself personally liable upon the bill.

Quare? Suppose the drawer had been suing the acceptor—would that have

made a difference as to the acceptor's personal liability?

Where a bill of exchange is drawn by a person signing as agent of a company, upon a defendant who accepts the bill—the acceptance admits the signature of the agent, and his authority from the company to draw the bill. It also precludes the setting of any legal technical objections in regard to the composition or description of the company—or their ability to draw the bill.

This case was tried in the Niagara District court, upon a writ of trial.

The plaintiffs sued upon a bill of exchange which ran thus:

Montreal, July 9th, 1847.

"£225 18s. 1d.

"Three months after date, pay to the order of Alexander Simpson, Esq., cashier of the bank of Montreal, two hundred and twenty-five pounds, eighteen shillings, and one penny, currency, for value received."

(Signed) "The Coalbrook Dale Company,

"per Philip Holland."

"To P. C. DeLatre, Esq.

"President Niagara Dock and Harbour "Company, Niagara, C W.

The bill was accepted in writing thus:

"Accepted payable at the office of the bank of Upper Canada, "Niagara."

(Signed)

P. C. DeLatre, President, N. H. & D. Co.

The defendant pleaded, 1st, that the Coalbrook Dale Company, in the declaration mentioned, did not draw the bill of exchange in manner and form, &c.

andly, that the defendant did not accept the said bill of exchange.

At the trial the acceptance was proved.

It was objected by the defendant's counsel that it was not shewn that Holland had authority from the Coalbrook Dale Company to draw the bill.

andly, that the defendant was not individually liable on his acceptance, but only the Niagara Harbour and Dock Company.

The learned judge over-ruled both objections, but reserved leave to move for a non-suit upon them.

The jury gave a verdict for the plaintiffs, 2331. 9s.

At the same sittings of the district court, another case was tried on a writ of trial; the same plaintiffs against the same defendants; on a bill of the same date for 2291. 8s. 3d., drawn at six months, by the same drawer, addressed to this defendant precisely in the same manner as the bill in the other action; payable, as the other was, to Alexander Simpson, Esq., cashier of the bank of Montreal, and accepted by this defendant in exactly the same form as the other bill.

The same issues were joined, and the same objections raised at the trial and over-ruled, with leave to move in this court for non-suit upon them; verdict for plaintiff, 2311. 6s. 2d.

A letter was put in evidence at the trial, written by Philip Holland

as agent for the Coalbrook Dale Company, to the defendant on the subject of these bills, which shewed clearly, that they were drawn on account of transactions which the Coalbrook Dale Company had had with the Niagara Dock Company, through this defendant as president of the last mentioned company; the former company having supplied the latter, as it appeared, with materials and machinery necessary for working and setting up steam engines, a business which the Niagara Harbour and Dock Company had been carrying on at Niagara.

Cameron, Q. C., obtained a rule for a non-suit on the leave reserved; he cited in support of his rule, 3 B. & Al. 1; 12 A. & E. 745; Story on Agency, sec. 154; 2 Taunt. 384.

Vankoughnet shewed cause, and cited 2 Atk. 182; 4 Esp. 187; 2 B. & C. 293; 4 M. & S. 13; 8 M. & W. 616; 11 L. Jl. 270, C. P.; 7 Taunt. 455; 2 Stra. 955; 5 M. & S. 345.

ROBINSON, C. J., delivered the judgment of the court.

With respect to the first issue denying the drawing of the bill by the Coalbrook Dale Company, there can be no question that the ruling of the judge at the trial was correct, for it is a general principle that "the acceptance admits the ability of the drawer to make the bill, and it admits also his signature." In the case of the bill which is drawn by a person signing as agent of the Coalbrook Dale Company, the acceptance admits his authority from the company, and it equally precludes the setting up of any legal technical objection in regard to the composition or description of the Coalbrook Company or their ability to draw a bill. For all we know they may be perfectly competent by law to draw bills of exchange in the same manner as they have drawn this; and as the defendant has accepted a bill drawn by them upon him, and has thus affirmed their right to draw, and thereby given credit to this bill, he cannot be allowed in an action by the payee or indorsee to question their right, nor even to question the fact that they did draw the bill, for if the drawer's name was forged they could still recover upon it. The cases of Porthouse v. Parker, I Campl. 82; Jenys v. Fawler, Str. 945; Price v. Neal, Burr. 1354; Lambert v. Pack, Ld. Rayd. 443; Critchton v. Parry, 2 Campl. 182; Smith v. Chester, 1 T. R. 654; Robinson v. Yarrow, 7 Taunt. 455; Bass v. Clive, 4 M. & S. 13; and other decisions cited in Bayley on Bills, make that point clear.

The ground upon which perhaps the defendant's counsel had more reliance was, that which he considered himself at liberty to raise on the second plea, viz: that the defendant did not accept the bill, by which he means that he did not accept it in such a manner as to make himself liable which is what the declaration in effect assumes and states. That he did write on the bill the acceptance which appears there was clearly proved.

Upon the point of personal liability we have felt it proper to proceed cautiously, and not to determine it without full consideration; because according as it must be decided one way or the other, consequences may follow in regard to persons transacting as president or other officer the business of this and other companies in this province, more serious and extensive than we are now aware of.

Whether the defendant when he accepted this bill, considered that he was making himself individually liable by such acceptance, or supposed

that he was binding the company alone, we can only conjecture. He probably did not imagine that he was involving himself in any personal liability, and did not intend to do so; but it is also very possible, that an officer of a corporation acting under such circumstances, may accept a bill as the defendant perhaps did this, without thinking or caring about the question of individual liability, because if he have the funds of the institution under his control, and knows that he will have money in hand to make the payment, which he can properly apply to that purpose, then any question about a possible recourse against himself may be immaterial, since he will take care to leave no occasion for it. But in fact, unlooked for losses and reverses in the affairs of a trading company may sometimes, while bills are current, so materially affect the solvency of the company, as to disable the officers, managing the affairs, from meeting their bills when due; and the holder of the bills may be disposed to avail themselves of their recourse against any one whom they can hold liable as a party to the bill. It becomes therefore an important consideration with persons acting in any capacity as the managing agents of companies or on behalf of individual principals, and important too for persons taking notes made, or bills accepted by them, that this question of personal liability should rest on understood grounds.

If this were an action by the Coalbrook Dale Company as drawer of the bill against the defendant as acceptor, then it might be material to shew, as I think was shewn in this case, that the bill was drawn for the price of goods furnished by the drawer, not to the defendant for his individual use, but to the Niagara Dock and Harbour Company, and then the bill being addressed to the defendant by his description of president of the company and accepted by him with the same addition to his name, would tend to shew that the transaction was with the defendant only as agent for the company, and that the funds of the company and not his own private means were looked to for payments.

It is unnecessary to consider whether on that principle, the acceptor could be held relieved from personal liability; or to refer to the cases in which that point has been determined; or to consider whether such a defence could have come up on this pleading, because this is not an action by the drawers, but by a third party, the Montreal bank, as holders, between whom and the acceptor, or the Niagara Dock Company, no privity whatever is shewn as regards the transaction which led to this bill being drawn.

The bill is drawn in favour of Simpson, calling him cashier of the Montreal bank, and we may therefore, it is true, look upon it as if the Montreal bank had been made in words the payee, and so had been originally parties to the bill, for the endorsement to them by their cashier was mere form; but that can make no difference, for there is no privity between the payee and drawer of a bill in regard to the original transaction; their only connection with each other is through the bill, and there is no certain reason for concluding that the bank took this bill in any other spirit, or with any other understanding than any subsequent indorsee might have taken it. They have an unquestionable right to look at the bill only, and to hold all parties liable to them, who could be held liable by any person having taken the bill for value.

Then this being so, we are all of opinion that the right of action by the bank against this defendant as acceptor, cannot be denied. The cases of Thomas v. Bishop, 2 Str. 957, Leadbitter v. Farrow, 5 M. & Sel. 345, and Sowerby v. Butcher, 4 Tyr. 320, leave no room for doubt on the point; we cannot hold otherwise. Goupy v. Harden, 7 Taunt. 160, is also a strong case decided upon the same principle, for there the agent was held personally liable to his own principal, because he had endorsed a bill received by him in the course of a transaction on account of his principal, and had not indorsed it in that qualified manner which would have saved him from personal liability.

The case of Leadbitter v. Farrow, 5 M. & S. 345, shews that it would have been no argument in favour of the defendant if the Niagara Dock Company could be shewn to be clearly liable on the bill; but if that could have helped him, it is a ground of exemption which does not exist in this case, for the bill is not drawn on the company, and the defendant therefore could not have made the acceptance in any form that would bind the company. Butt v. Mooral, 12 Ad. & Ell. 752, is in point under these circumstances. And if the bill had been drawn upon the company, then it would have been material to consider that the defendant did not accept it, either in the name of the company, by using their corporate name, nor did he sign it as by procuration for the Niagara Dock Company; but he accepts in his own name, adding to his signature, what we can only look upon as matter of description, "President of the Niagara H. & D. Co."

If he had accepted it in such a way as could not bring a personal liability on himself, as by using the company's corporate name and not his own, or by signing in his own name for the company, or adding to his signature the words, "without recourse against myself individually," then the payees would have seen either that they had no acceptance that could bind any one, or that it could bind the company only, and they would have been content with it or not in that form, as they might be advised; but the acceptance being given, as this was, on a bill drawn as this was, the holders have a right to look upon the defendant as personally responsible, and are entitled to take their remedy against him.

If it could have availed this desendant to determine that an action would lie on a bill of exchange, drawn upon and accepted by the Niagara Dock Company, for the materials or machinery of steam enginessold to them, then we should have had to determine some points which were discussed in this court in the case of Hamilton v. Niagara Harbour Company, and which I apprehend have not sufficiently engaged the attention of that company, for they seem to have continued without any alteration of their charter in a course of transactions and business which it was then intimated by this court might be found not to come legally within the scope of their charter. Independently of this consideration, however, and as this case stands before us, we consider the plaintiffs entitled to recover because we think the following points are clearly in their favour.—That even if the company could, under the circumstances, have been held liable to the plaintiffs on this bill as acceptors, they could not in this case, because the bill is not in fact drawn upon them; and because it is not accepted by them; nor by the defendant for them. Either, therefore, the defendant is liable individually, or no one is liable; and he is clearly liable because he has in his own name accepted the

bill, and that acceptance is not the less binding on him because the addition of president of the company is added to his name, that being merely matter of description, and there being nothing added to his signature expressly disclaiming personal liability, or restricting the liability to the funds of the association.

If under such circumstances, the defendant could successfully resist an action upon the bill by the drawers, still he clearly cannot resist an action brought as this is by a third party or holder of the bill, who knows nothing of the transaction but what the bill discloses, and has therefore a right to insist strictly on what the bill imports, and on all the legal consequences.

A letter which I have before alluded to, was put in at the trial, from Holland, the agent of the Coalbrook Dale Company, to the defendant, which seems to have been relied on for proving that this action is really brought for the Coalbrook Dale Company, and that they are the real plaintiffs. It is not dated, but I infer from the post mark and the contents that it was written after this action was brought, and it does seem to show that the Coalbrook Dale Company had, or assumed to have when it was written, a control over this action. But in the first place, if that evidence went so far as to show that the Coalbrook Dale Company are the real plaintiffs in this action; and if the facts were that this bill was drawn for goods supplied to the company, and ordered by the defendant, not in such a way as to make him individually liable, but clearly upon the credit of the company alone; and if that would be a defence to an action brought against the defendant by the drawers of a bill afterwards accepted by him for the amount, such acceptance being general, as this is, and not qualified or restricted (and I am not satisfied that it would be a defence), yet it would in my opinion require to be pleaded, and could not avail the defendant under the plea simply denying that he accepted the bill.

Then in the next place, I do not think that the jury could properly conclude from anything in the letter referred to, that the Montreal bank are not in reality suing in the action for their own benefit. They have a right to hold the Coalbrook Dale Company liable to them on the bill, as well as the defendant; and while they are pursuing their remedy, as they may be doing bona fide, against the defendant as acceptor, it is not out of the ordinary course that it may be well understood between Mr. Holland, as agent in this country for the Coalbrook Dale Company, and them, that they should in the first instance sue the person primarily liable, and endeavour to get the money from him, unless Mr. Holland should choose to interpose and grant indulgence to the defendant, which on the terms stated in his letter he seems willing to have done, in which case he could of course take up the bill by paying the Montreal bank, and would either sue the company afterwards upon it, or by understanding with the Montreal bank, allow the action to proceed in their name for his benefit.

The letter does not lead to any certain inference whether this action is in fact proceeding for the benefit of the Montreal bank, or whether they merely allow their names to be used in collecting it; and if we were at liberty to draw the inference most favourable to the defendant's case, that would not open the way to any defence that could be set up under

either of the pleas on the record, if it would furnish matter of defence at all, which at present I am inclined to think it would not.

The principle on which an agent accepting a bill, or making any other promise in the course of a transaction which he has on account of his principal, may be held liable personally, unless he takes care to guard against it by his qualified manner of making the contract, is fair enough in itself, and is stated in numerous cases. It is the same principle to which we felt ourselves obliged to give effect in the case decided last term of Simpson v. Kerr, and which is strongly stated in Cullen v. The Duke of Queensbury and others, in I Br. C. C. 181, in which a remedy was sustained against some members of a voluntary association, when it was contended that the credit could only be considered as having been given to the fund. "It is their fault (the Lord Chancellor said) if they enter into contracts "when they have not money to answer for them; they have made themselves "fiable by their own acts." So here the law looks upon the defendant, when he accepted this bill, as saying to the payee: "I, being President of the "Niagara Harbour and Dock Company, engage to pay the sum mentioned "in this bill in three months, to whoever may be the holder of it."

That gives all parties a right to look to him as absolutely undertaking to make the payment, because, admitting it clearly to be on account of some debt due by the Niagara Harbour and Dock Company, still there is nothing strange or incredible in his binding himself to pay the money with the knowledge which he may be supposed to have of the funds, and his own means of applying them. He is considered by his acceptance to pledge himself that the money shall be forthcoming, when he says nothing to limit his undertaking and to exclude personal liability, which he certainly has not done in this case; but the contrary, for as this bill is drawn and accepted, it either binds him, or it binds no one. He is bound to pay the money in the first place, and is left to settle the amount afterwards in account with the company whose affairs he is managing. In addition to the cases which I have cited, I refer to 5 B. & Al. 34; Ambler, 769; Hardr. 205; Yelverton, 137; Dyer, 230 a.; 5 Esp. C. 247; 5 Taunt. 749; 3 D. & R. 503; 8 M. & W. 798, 834, 845; Bayley on Bills, ch. 2, sec. 7; 3 B. & Al. 47; Ryan & Moo. 229; Moo. & Malk. 450; 3 Nev. & Mg. 456; 3 B. & Ad, 114.

The defendant's counsel, in the argument, referred to American authorities, and it is always advisable and useful on questions of this nature to look for information in that quarter, for in applying legal principles to mercantile contracts and dealings, and the remedies upon them, the American Courts have generally gone before those in England in introducing such relaxations as have seemed necessary for the convenience and safety of those engaged in commerce; and they have, in some instances gone further, without the aid of legislative enactments, in moulding the principles of common law to suit supposed exigencies, than English Courts of Justice have yet ventured to go. Yet as such questions present themselves, they desire to justify the relaxation by as much authority as they can find in favour of it in English decisions, and we may generally therefore, expect to find such authority cited so far as any exists.

With this view I have looked into whatever Mr. Justice Story has

collected on the subject in his work on promissory notes and on agency. It is more extensively considered in the latter treatise; in sec. 154, and a number of following sections; and the subject is again taken up in sec. 267, and pursued through many pages of the work. He considers the principle to be—"that if it can on the whole instrument be collected that "the true object and intent of it are to bind the principal, and not bind the "agent, courts of justice will adopt that construction of it, however inform-"ally it may be expressed." But among the multitude of cases cited in illustration of the principle, there is such a conflict of decisions that it seems to me very difficult to say that the principle stated has been by any means closely maintained. Many cases are cited which seem to support the present plaintiff's case, and others having a contrary tendency,

None resembles it more closely than a case cited in the text of sec. 276, where "certain persons, it is said, signed a note, describing themselves as "trustees of the Union Religious Society, and it was held that they were personally liable thereon, although it was proved that the society was a "corporation, and the note was given for a balance due from the society for a church bell."

In section 154, and in the note to 269, cases are cited which seem opposed to this, and I do not think any clear principle can be deduced from the cases, though if we were at liberty to determine this case rather upon a review of American than English decisions, then I should say, that judging of these as they are collected and set forth by the late Mr. Justice Story (and we can have no better guide to them) the weight of their authority would be found to preponderate in favour of holding the defendant in the case before us, liable upon his acceptance.

But looking, as we are bound to do; to the decisions of English Courts of Justice, as our guide, the defendant is in our opinion so clearly liable to this action, that there is really nothing to found a doubt upon. And it is only from an apprehension that the decision in this case may be in some measure a surprise upon persons who have acted in other cases as this defendant has done, that I have thought it necessary to go at large into the question.—We are of opinion that the rule for non-suit in the two cases must be discharged.

Per Cur.—Rule discharged.

DOE SOMERS ET AL. V. BULLEN.

A, leased a mill for a term of years to B. C. and D., who covenanted to pay the rent without default; otherwise the deed to be null and void. And A. covenanted that they should hold quiet possession of the premises during the term, provided they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up and afterwards obtained the key from one of the lessees—and A. distrained for rent such property as he found in the mill, which proved insufficient to pay the rent due—and refusing to give up the possession, the lessees brought ejectment; Held per Cur., that the lease being void by reason of the non-payment of the rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession—and that the lessor of the plaintiff could not recover.

MACAULAY, J., dissentiente.

Ejectment for a grist-mill and saw-mill, and the premises thereunto be longing, in the village of Delaware.

24 (to $24\frac{1}{2}$)

Verdict fot the plaintiff, subject to the opinion of the court on the following case:—

On the 17th of March, 1847, the defendant Bullen demised by deed these premises to the lessor of the plaintiff, by the name of Going & Co., merchants, for three and a-half years from the date of the lease, at the rent of £100 per annum, payable quarterly, one half in cash, and the other in the produce of the mills at cash price; and the lessee covenants to pay the rent without default, otherwise "these obligations to be null and void."

On the 29th June, 1847, the plaintiffs, Somers, Going, and Ryland, dissolved partnership, all remaining jointly liable for rent then due; and by the articles of dissolution it was provided that Somers should become from that time solely interested in the mills and premises demised by Bullen, and should pay the accruing rent, saving the other two harmless from all claims on account of such rent.

In September following, one Richard Ryland was in possession for Somers, and locked the door of the grist-mill, keeping the key, when a brother of the defendant, Bullen, came to him and asked for the key in order to secure certain property which had, as he said, been distrained upon by him for the rent.

It appeared that he had got into the mill from the outside, coming up through the floor, and had opened the outer door by forcing back the lock, and the key was required for the purpose of locking the door again. Richard, Ryland gave the key for the purpose for which defendant's brother had asked it, and after the sale he went to the mill and found the defendant and Going, one of the lessees, there, who both told him that he had nothing more to do with the premises, as the defendant was then in possession. What was distrained upon in the mill was not sufficient to pay the rent.

The lease contained stipulations on the part of the lessees that they would pay all taxes, and would build a stone chimney in the grist mill; and remove the smut machine from the upper to the lower story, provided the insurance company should require the removal before they would effect insurance.

It was proved on the trial, that they had done neither of these things, but it was not shewn that the insurance company had required the removal of the machine. The lease further provided, "That at the expiration, or other "sooner determination of this demise, the lessees should yield up peaceable "possession of the premises, in good repair, and the defendant Bullen on his "part covenanted that Going and Company should hold quiet possession of "the premises, during the term, provided they should perform all the said "covenants."

The defendant on the trial of this ejectment, moved for a non-suit.

1st: Because the rent was not paid, and the defendant had distrained.

andly: Because the taxes had not been paid.

3rdly: Nor the smut machine removed.

4thly: Because Going, one of the tenants, had surrendered the premises to the defendant.

It was contended that the agreement upon the dissolution of partnership could not affect the landlord, as it was a mere matter of arrangement among the tenants themselves.

It appeared to the learned judge at the trial, that by distraining, the

Jandlord had waved the forfeiture for non-payment of rent, and that he could not get into possession in the manner proved, and then claim to hold an account of the failure of the tenants to perform the covenants; a verdict was therefore directed for the plaintiff, subject to the opinion of the court, and with leave to enter a non-suit upon the points reserved.

Wilson, of London, for the plaintiff, contended, that Going having relinquished his interest in the term to Somers, could not afterwards. place the landlord in any different situation by pretending to surrender the term to him, or by consenting to his retaining the possession which he had improperly taken; and that there could at any rate, be no valid surrender under the Statute of Frauds without a note in writing. By distraining for the rent, Bullen admitted the relation of landlord and tenant to be continuing, and thus waived the forfeiture.-Adams on Ejectment, 160. It is true that by the terms of the lease, a failure to pay the rent would work a forfeiture of the lease, but to take advantage of that a formal entry and demand were necessary.- 2 Ld. Rayd. 1424; 6 B. & C. 519. Here the landlord committed a trespass in breaking into the mill; by distraining for the rent he waived the forfeiture previously incurred; and was a trespasser by continuing in possession, and could be compelled by this action to leave the premises, that the tenant might be restored to the benefit of his term.

Beecher, of London, for the defendant; the forfeiture was not waived by the act of distraining, the full amount of rent not being made by the distress. The 4 Geo. II. ch. 27, makes the distress equivalent to a demand.—Adams on Ejectment, 174; 6 T. R. 220.

Every thing turns on the difference between a mere right to re-enter for a breach of the covenant and a promise such as there is in this case, making the deed absolutely null and void. The right to enter may be waived by a subsequent act, but the lease being made void, and not merely voidable by re-entry, cannot be set up again.—Woodfall L. & T. 240; 4 B. & Ad. 401; Gow. 220; I Dougl. 57; Co. Litt. 215 note.

ROBINSON, C. J.—If the terms of this lease were construed most strongly against the tenant, and were taken to amount to a condition, that if the rent be not paid at the day, the lease shall be null and void, still it seems that by the common law there could be no forfeiture of the term under that condition, unless the rent had been demanded by the lessor on the day and with all the formalities which the common law required; and the lessor pleading in avoidance of the lease, without shewing such demand, must fail. This seems to be laid down upon such good authority, and to have been so frequently determined, that we must admit it, I think, to have been the law, though we may meet with some dicta of a contrary tendency; and the principle held equally at common law with respect to leases in which the condition was that they should be void in case of non-payment, as with regard to those which were only voidable by re-entry. We cannot, I think, hold that the law was at any time otherwise before the passing the statute 4 Geo. II. ch. 28, which seems to have been made with a view to cases where re-entry was necessary for avoiding the lease. But I assume that the necessity of a previous demand is dispensed with by that statute in effect, as well where the lease is void without re-entry, as where it is voidable by re-entry. The consequence of this is, that in the case before us, when the condition was

broken by non-payment of the rent (six months or two quarters being in arrear) the landlord was in a situation, by virtue of the statute, to bring ejectment for the forfeiture, although he had made no demand at the day.

Here he has had no occasion to bring ejectment; but having got into possession, an ejectment is brought by the tenant against him; and it is contended that he has no right to maintain his possession, for that in the first place, the forfeiture for non-payment of rent had been waived by the landlord's act in distraining for rent, which it is said admitted that the tenancy was still continuing notwithstanding the non-payment; for otherwise the landlord could not have distrained. That is true at common law; but it would seem unreasonable to give effect to that principle, since the statute 8 Anne, ch. 14, which allows the landlord to distrain after the expiration of his term, provided his title continues, and the tenant is still in possession.

Whether, at any rate, the landlord can be held to have waived the forfeiture in a case where the lease contains a condition that it shall be void on non-payment, and does not merely reserve a right to re-enter, is a point which does not seem to stand clear upon the authorities.

In very many cases it has been held, that where the lease is thus made void, the term cannot be set up again by any act of waiver, and that certainly is consistent with general principles of law; nor do I see that the modern cases, in which it has been held that the lease is only subject to be held void at the option of the lessor, are at variance with that doctrine, unless they must be considered as going the length of denying to the lessor the right to exercise that option, after he has done in the mean time any act which can be taken to be an admission of a continuing tenancy.

Those cases are only decisions that the lease is not necessarily avoided by non-payment in so strict a sense, that a stranger, or even the lessee himself, can set up the forfeiture, although the landlord for whose benefit the condition was inserted, shews no intention to take advantage of it. To allow the lessee to say that he had forfeited his term by not paying his rent at the day, and therefore that he was absolved from all the covenants and conditions of his lease, and that the lessor could maintain no action upon it either for rent or on any covenant in the lease, would be monstrous, for as the courts in England have observed, it would make the continuance of the term dependent at all times on his mere discretion, and it would be allowing him to take advantage of his own wrong, which is contrary to a well settled general principle of law, and would be contrary also to another general principle to which all forfeitures are subject, namely, that it is for the person for whose protection the condition has been created, to enforce it or not, as he chooses.

I do not see why it should follow that the former doctrine, that the lessor cannot be held to have lost the benefit of the condition in such cases by any act of waiver, which doctrine has the best and highest authority in the law for its foundation, must be held to have been "considerably shaken," as modern treatises express it, by those cases which determine nothing more than this, that the tenant cannot claim an advantage to himself by setting up a forfeiture as created by his own

laches or misconduct. And it might, I think, consistently with all those cases, be still held, that though the tenant cannot rely upon the forfeiture occasioned by his own non-payment of rent for avoiding the lease, so long as the landlord has chosen to forbear insisting on the forfeiture, yet that he has, by non-payment, under such a lease, placed himself in that situation, that the landlord may, whenever he pleases, put an end to the term, by claiming the benefit of this condition, and of that principle of law which holds, that a deed once void can never be set up again. The receipt of subsequent accruing rent might reasonably be held to have created anew the relation of landlord and tenant, as on a holding from year to year without conceding, as a necessary consequence, what is so directly repugnant to many adjudged cases, as that the very term which has been made void by the breach of the condition, can be set up again against the will of the lessor. And it is in that light that the effect of such cases as Reid v. Farr, 6 M. & S. 121, Doe v. Bancks, 4 B. & Al. 401, and Arnsby v. Woodward 6 B. &. C. 510, have been sometimes considered,

On the other hand, there is so much of inconvenience, and of apparent, injustice, in a lessor forbearing at the time to enforce the forfeiture for nonpayment, receiving his rent after the day without objection, and thereby encouraging the lessee to go on with confidence, making perhaps expensive improvements, while reckoning on the certain continuance of his term, and then that the lessor should be able afterwards to revert to the bygone cause of forfeiture, and suddenly put an end at his pleasure to the term, and reduce the lessee at least to the condition of a person holding from year to year; that it is natural that the courts should lean against such a course fully consistent as it is with the doctrine, that a lease once void by breach of a condition cannot be set up again by any act of the lessor, And we ought, I think, gladly to avail ourselves of whatever authority there is for warranting us in holding that there may be acts of the lessor with notice of the breach, which will waive the forfeiture, even in those cases where nothing is said in the lease about re-entry, but where the lease broadly provides, "that the term shall cease and be utterly void." I say where nothing is said in the lease about re-entry because it will be observed, that in some cases, where the proviso in the lease is of a mixed and less determinate character as "that the term shall be void, and it shall be lawful for the lessee to re enter," the insertion of these latter words has been construed to qualify the others, and to indicate an intention that the lease shall only be subject to be made void by re-entry.

On the whole view of this question, I do not find that we should be clear of difficulty, in holding that the lessor can by any act of his be held to have disabled himself from insisting upon avoiding a lease for breach of a condition, when, by the provisions of the lease, the term is to cease, and the deed to be void in case of breach; and I think the weight of authority is against it, yet my inclination would be to go as far as we could find ourselves justified by English decisions, in holding that there may be a waiver by the act of the lessor; and when it becomes necessary to decide such a question, I hope we may find ourselves clear in coming to that conclusion, for there is much in the language of the judges in some cases to that effect though I can find no case in which the point has been adjudged, where the condition says nothing of the entry.

But what are the facts here, and how are the parties before us?

The defendant made a lease to Going and Co., merchants, and expressly in the lease restrains them from sub-letting. Going, the only person named in the lease, was privy and assenting to the resumption of possession by the defendant, though it was no doubt against the will of Somers, one of the firm of Going and Co., and the person to whom it was a reed, upon the breaking up of the partnership, the right of possession should exclusively belong for the remainder of the term. The rent being in arrear two quarters (the first two that had accrued under the lease), the lessor enters to distrain, and seizes and sells what he finds on the premises; and there not being goods enough to satisfy the rent, he continues in possession, and with the consent and approbation of Going, refuses to allow Somers to enter, contending that the term is at an end from the failure to pay the rent, and Somers in consequence brings this ejectment.

The case of Doe. dem. Taylor v. Johnstone, I Stark. 411, has a good deal of application to the circumstances of this case, for there the lessor (as here) entered for the purpose of making his rent by distress, if he could and it was contended, that by continuing in possession of the goods after the five days, he had thereby acknowledged an existing tenancy and waived the forfeiture; but it was answered, that since there was no sufficient distress, the breach in non-payment was a continuing breach, and that consequently the right to re-enter remained entire. The lease there was only voidable, not void, giving a right to re-enter on non-payment of rent. Lord Ellenborough held, that though a right which had accrued at the time of the distress might have been waived by it, yet the party was not estopped by it as to any right which accrued subsequently; and this ruling of Lord Ellenborough's is apparently adopted and approved of, wherever I have found it referred to.

So here, a demand on the day being, as I think, dispensed with by the statute, the lessor entered, and endeavoured to obtain his rent by distress, Admitting that he shewed by that act a consent to waive the forfeiture by non-payment at the day, and that such implied waiver would conclude him, still all that we can say is, that he shewed a willingness not to exact the forfeiture, if he could get his rent; but having tried this remedy, he failed, There the rent continuing in part unpaid, it was a continuing breach, for which the lessor's right to the possession could not be denied; and that right, namely the lessor's right to enter where he discovered that he could not make his rent, is treated by Lord Ellenborough as a right which accrued subsequently; and having this legal right to enter, it would seem absurd to say that he can be compelled by law to go out. In Shepherd's Touchstone, 154, it is laid down-"So if a man make a feofiment of land "to me in fee, on condition that I shall pay him f20 on such a day, and "before that day I let the land to him for years, rendering rent, and after "the condition is broken; in this case he may retain the land without entry "or claim, and the rent is extinct; for when the condition operates, it de-"feats the title on which the term depended; and he shall hold the posses-" sion by virtue of his title under the condition. To enter would be actum " agere."

So it seems to me reasonable to hold here, that where the lessor had

exhausted his remedy by distress, and there was still rent behind, which entitled him to the possession, he was relieved from the necessity of any entry, by the fact of being already in. And this is confirmed by the principle acted upon in a case reported in Plowden, 92, namely, that if a person who has in law a right to enter, does an act not apparently in the intended exercise of such right, but such an act as that, if he were a stranger would give a right of action against him—there the law says, that rather than he shall be punished as a trespasser, it shall be an entry and remitter to him. This principle was affirmed in Doe v. Wood, 2 B. & Al. 736.

We cannot, I think, look upon the lessor as a trespasser for being on the premises when his rent was unpaid, being as formally demanded by the distress as it well could be, for he had then a right to be there by the term of his lease; and to what purpose can Somers be allowed to maintain ejectment when the lessor was not a trespasser, and when he has himself no longer a legal right to the possession? If he can be looked upon as a party to the lease, coming under the designation of *Going & Co.*, then by his own express covenant the lease is to be void if the rent is not regularly paid, and his right to the possession is in another part of the lease expressly made to continue only so long as he shall perform all the covenants.

If we grant that at common law the lessor in such a case as this must have demanded the rent before the forfeiture would accrue, still it is clear that the 4 Geo. II. ch. 28, makes the fact of distraining, and of the distress proving insufficent, equivalent to a demand at commou law. Then here the landlord distraining was, when the distress proved to be insufficent, in the same situation as he would have been at common law just after he had made his demand, and would at that moment be placed in possession (if I may so say) of a cause of forfeiture for the first time, which he can no more be held to have waived by the act of distraining, than the lessor had waived his forfeiture in Doe dem. Taylor v. Johnson, r Stark. c. 411.

The irregular manner by which the lessor entered in this case would naturally lead to an unfavourable view being taken of his case; but I cannot say that such an impression would be altogether just, for we have no warrant for assuming that he entered with any other object than to distrain; and he might naturally conclude, that a mill, for which so considerable a rent was to be paid, would contain enough property to produce the amount; so that we can hardly infer that he entered only upon the pretence of distraining, having another purpose at the time in view. A tenant who leaves his rent unpaid, and turns the key upon his landlord, does not stand in a favourable position; and in England it has been determined that where the tenant locks up his premises, so that they cannot be got at for the purpose of distraining, the landlord is at liberty to act (with reference to the stat. 4 Geo. II., ch. 28,) as if there was no distress on the premises. It seems to me impossible to hold, that the landlord is in a condition to bring ejectment against Somers on account of non-payment, as I think he was if the latter had continued in possession, and yet that he is at the same moment liable to be turned out by Somers in ejectment, which is the very object of this suit.

There is difficulty, however, in reconciling one's self to the apparent

hardship of the tenant being thus deprived of the opportunity of relieving himself by paying the rent and costs, as I suppose he might do under the statute at any time before the trial, if the landlord, being out of possession. had been obliged to resort to his ejectment. There are often cases, however, where to save parties from such consequences, and even from greater penalties, it behoves them to be vigilant and punctual. There are many cases of forfeiture under conditions in leases, besides those which regard the payment of rent, and in all such cases the tenant is left without that protection against the consequences of his default, which the 4 Geo. II., ch. 28, affords, as regards payment of rent, for that is confined to cases of non-payment of rent only; and this is as strong a case against the tenant upon the lease as it could well be, for it is not merely the case of a reservation of rent by the landlord with a condition to be void for non-payment, in which case he alone may be considered as stipulating or reserving a condition in his own favour; but the tenant expressly covenants, that if he does pay punctually, then the obligation, (as he calls it) by which he must mean the deed, shall be null and void, so that he is really bringing this ejectment in the face of his own covenant.

If there is in fact hardship in the case, which may or may not be, I am not determining that the lessee has no means of relief open to him, at law or in equity, tut only that, in my opinion, he cannot sustain this ejectment in a court of law, in order to be placed in the enjoyment of a term which, by his own contract, was to cease in case he should not pay certain rents which he has not paid. If, by any application that this court could make of the 4 Geo. II., ch. 28, or by any equitable interposition on grounds independent of that statute, an opportunity could be afforded to the tenant under the circumstances of this case to relieve himself from the consequence of the forfeiture by paying the rent and costs, then the hardship which I refer to would not occur; and on the other hand, if a court of law has no jurisdiction to relieve in such circumstances, and if the tenant has an equitable claim to be relieved, then I assume that a Court of Equity would have the same right to grant relief as in other cases of forfeiture by lessees where courts of law cannot interfere; of which there are many, and the only question would be whether the lessee had gone to equity in time.

My view of the case is, that it is quite clear that since the stat. 4 Geo. II. ch. 28, an entry in order to distrain cannot be held to be a forfeiture for non-payment, because such entry and distraining is expressly substituted by the statute for the demand which the common law required, and which was clearly not a waiver; and the right is expressly saved to the lessor to bring ejectment afterwards if he does not find sufficient distress: therefore at last the case comes to this, whether the lessor being in a condition to bring ejectment and recover against Somers, is at the same time liable to be dispossessed in an ejectment by Somers. That I think cannot be unless in some case where a defendant may be estopped from setting up his title, which he sometimes is, as where he has gone in under the plaintiff, or where he has got unfairly into possession tampering with the plaintiff's tenant, or servant, or agent. I cannot hold that what was proved in this case, placed the lessee

in any such a situation, for I see nothing more than that the tenant having left the premises unoccupied and shut up, the landlord broke into the premises for the purpose of distraining, and obtained from the plaintiff's agent the key for the purpose of securing the distress; that he then proceeded, and as I think we should assume, (for all that appears) bona fide with his distress, and being unable to make the full amount of rent, he then continues in possession, and the question arises, has he a right to the possession, or has he not? I think clearly he has, according to the plaintiff's own covenant, by which he agrees that the term shall cease, and the lease be void, if the rent be not paid, which it was not; I see nothing here but the facts of entering for the purpose of distraining; and the failing to make the rent, and the continuing in possession, and then the question who has the right to possession?

If a landlord, a month after the term has ended, should enter on a farm to distrain for his rent, the tenant not residing on the premises demised, but on some neighbouring property, he would surely not be obliged to remove from the premises, though the tenant's interest in them had ceased merely because he had entered to distrain. I see nothing here that we are at liberty to treat as a fraudulent contrivance; and on the ground that the right of possession according to the contract of the lessee is now with the lessor, the lessee is not I think in a situation to maintain ejectment.

The rule for non-suit should, in my opinion, be made absolute. This is the best opinion which I can form upon the case; though, as we do not all take this view of it, I am less confident in that opinion than I would otherwise be.

MACAULAY, J.—Treating the clause for making void the lease for breach of the covenant to pay the rent as a condition, then at common law a demand at the day would be essential to work a forfeiture; but such demand being made the lease would be void, both as respected the tenant and landlord; although were a mere right to re-enter reserved, the lease would continue voidable only till entry made. In the absence of a demand at the day, the landlord's only remedy would be by ejectment under the statute 4 Geo. II. ch. 8, which dispenses with a formal demand, and renders service of ejectment, equivalent thereto.

If in the present case it is not to be treated as a condition, but as a covenant and agreement to pay rent at the peril of a forfeiture; and admitting that under such circumstances no demand would at common law be necessary, it would follow that upon default at the day, the Jease was void without more. If so, it follows that the defendant had a complete case at common law, with liberty to avail himself of the forfeiture, and to enter without the aid of any statute. But the clause for avoiding the lease being penal, is to be construed strictly, and being a provision in torrorem for the benefit of the defendant, he was not bound to avail himself of it, but had an election to continue the lease notwith-standing; and if so, it follows that he could waive the breach of coverant, that the lease should be void in the event of the rent not being duly paid; and the only question is, whether he did waive it. Then he distrained for rent; this at common law would clearly be a waiver, whether all the rent was realized or not, because it affirmed the continuance of

the term, and evinced an election to enforce the arrears as rent against the land as debtor. The remedy by distress is peculiar, and to a certain extent in itself substitutional of the feudal mode of redress by forfeiture. So looking at this case at common law, the forfeiture would seem to have been waived.

But it is said the statute of 8 Anne, ch. 14, sec. 6, prevents the distress being an estoppel, it having been made within six months, &c. The answer that suggests itself is that this statute supposes the term ended or determined, and only applies in such cases; that here the defendant had done nothing before distraining, indicating an intent to put an end to the term and that if the court is to lean against forfeitures, it cannot be intended that he did; and further, that even if owing to this statute the distress was equivocal, the court should then lean in favour of a waiver rather than against it.

Without doing any thing to evince an election after default made in payment of the rent, he distrained for two quarters' rent, such distress as to the first being clearly a waiver, and as to the second, a waiver prima facie; nothing to the contrary being shown, it may be said therefore, the statute of Anne has nothing to do with it, unless the term had ceased absolutely, as respected both landlord and tenant, before the distress, which it had not.

Then it is said, that the statute 4 Geo. II. ch. 8, entitled the defendant to distrain for rent to complete a case within its provisions, and if not all realized, afterwards to resort to an ejectment, and if to an ejectment, that he might retain possession peaceably acquired without it. The answer that occurs is, that this argument concedes the term to be continuing at the time of the distress, repelling any intention to distrain under the statute of Anne, as after a term determined, and that so far as the statute 4 Geo. II. ch. 8, goes, the defendant has not complied therewith, or pursued the remedy thereby given, and has deprived the tenant of the opportunity to seek relief under it before the trial of an ejectment. To this it is said, that an ejectment under that statute is only substituted for a formal demand at that day, and that here no demand was requisite by the nature of the covenant. If so, that shows no necessity for, and repels any intention of, distraining to make a case within the statue 4 Geo. II., and it is only in relation to that statute, that a distress has been held not to be a waiver.

Lastly it is said, the rent not being all made under the distress, it was a continuing breach, of which, if dispossessed in this action, the defendant might still avail himself, and immediately re-enter or bring ejectment, and that therefore he may defend, the possession he has. The answer is, that it is by no means clear, that though the covenant for payment of rent continues broken, such breach continues to work a continuing forfeiture. If the distress waived the forfeiture, or the breach, quoad the forfeiture, it would no longer continue, and the question is, whether or not the distress did waive it.

If it can justly be said, that the tenant covenanted to this effect; that I will pay the rent at the day, otherwise this lease to be void, and that so long as the defendant could in an action on this covenant, assign a breach by reason of the non-payment of some portion of the rent in arrear, the agreement of the tenant is to be intended—that the lease

should be therefore void. I do not see that the defence is not sustained, for if not all paid, clearly an action of covenant for the rent would be sustainable unless outlawed.

Of course, while any rent remains in arrear, an action lies on the covenant; still the breach of covenant to be assigned would be nonpayment at the day; the amount still due is only material in relation to damages; so if the lease by reason of such default is void, it is void at and upon the day of the breach committed. I am not satisfied that the lease could at the election of the landlord continue and subsist to a future day, and then be declared void on and at the day, or from a future day, because the same default continued wholly or in part; in other words that by distraining, the forfeiture was only suspended to abide the event, with leave to the defendant to recur to and enforce it. should he fail to realize all the rent. I find no case in which a distress for rent has been held not to be a waiver per se without regard to the result, except in relation to the statute 4 Geo. II. ch. 8; nor do I find any case in which a landlord having entered and distrained for the rent in arrear, has been held entitled to oust the tenant, and to hold overafter the sale of the distress, by reason of a forfeiture incurred before the distress by the non-payment of the rent at the day, and the unreasonable and unjust consequences to which it might lead, operate strongly against such an inference...

On this lease and covenant the defendant had two courses open to him, besides that of peremptorily enforcing the forfeiture, namely, at common law, and under the statute 4 Geo. II. ch. 8. At common law the distress was a waiver, and under the statute he should have resorted to an ejectment, which would have afforded the tenant the opportunity of coming in before trial and staying proceedings by payment of the rent due and costs.

If in this case he had an election to treat the covenant as a condition, and to enforce the forfeiture under the statute, it may be said, he could, if ousted in this action, immediately bring an ejectment under the statute, and that therefore a circuity of remedy is all that would follow, and to which the court would not drive him.

I should think this a strong argument against this action, if the distress did not operate as a waiver; but if it did, the defendant could not afterwards resort to the statute to enforce a forfeiture that had been waived, and the course adopted by the defendant shows that he did not distrain with a view to proceeding under the statute.

It seems reduced then to the question, how far it constituted a continuing breach, preserving the defendant the right to act upon and enforce the forfeiture, notwithstanding the distress, the rent not being fully satisfied. The difficulty I feel in this point is, that the forfeiture relates to the time of the default, and I do not find that it was in the discretion of the defendant to waive or suspend it for a time in order to try the effect of a distress for the rent, and then to recur to and treat the lease as void ab initio, I mean at common law and irrespective of the statute 4 Geo. II. ch. 8.

The rest of the court are, however, clear that such is the effect of the agreement, and therefore, though doubtful in my own mind, I must believe it the soundest view of the case; and I am by no means prepared

to say it is not susceptible of this construction.

The first consideration is, what the legal meaning and effect are of the passage incorporated in the covenant to pay the rent "otherwise these obligations to be null and void;" and in the covenant for quiet enjoyment, "provided the said Going & Co. shall perform all the said covenants." The former precedes all the other covenants, and therefore relates exclusively to the covenant to pay the rent.

The term "obligations" cannot mean the covenant itself, if it did it would be repugnant and inconsistent, and therefore void. The passage is interlined in the lease, and the words, "these obligations" were no doubt by the parties intended to be equivalent to "these presents," or "this lease." At all events this view is the most favourable to the lessor, and being the words of the lessee, should perhaps be construed most favourably for the former.

In terms the lessee covenants that the obligations of the lessor shall be void if he fails to pay the rent reserved according to his covenant; and consequently a failure to do so enables the lessor to set up this covenant or agreement, that the lease should be void, if he wishes to avail himself of it.—3 Taunt. 252; I Ch. Pr. Law, 290

That (however the passage may amount to a condition) it is not so explicitly, will be seen by comparing it with the forms and cases, and among others with Browning v. Beston, Plow. 131, 2, treating it as substantially equivalent to the ordinary clause declaring leases void for non-payment of rent.

The next thing to consider is, whether it constitutes a limitation, or only a condition, as to which see Sheppard's Touch. 117, et seq., wherethe distinction and comparative effects are explained.—Gilbert on Rents, 86; Vaughan 31, 32; Co. Litt. 214, b. sec. 347.

I assume that at the utmost it is but a condition; that in default of payment of the rent at the days, &c., the lease shall be void, that is, defeated or destroyed.

More strictly it is but a covenant or agreement, I Ch. Pr. Law, 290; I M. & W. 189, Doe Davis v. Elsam; that provises for a re-entry in a lease or not to be construed with the strictness of conditions at common law, but as matter of contract between the parties, and as other contracts according to fair and obvious construction without favour to-either side.

The meaning of which is, that at the present day such conditions are like other contracts, to be expounded according to the intent of the parties as collected from the instrument. So the subsequent proviso may be a condition applicable to all the covenants.

Conditions of this description are of two kinds, viz; conditions reserving to the landlords merely a right to re-enter in default of payment of the rent, which the latter would only be; and conditions that in such default the lease shall be null and void; both constituting forfeitures of the term. A distinction may, however, exist between them, to this extent: that under a clause of re-entry, the lease is only voidable, and not void until by entry it is avoided and made void, as in law it thereby undoubtedly would be; while under the other clause the lease is void immediately upon default made without any entry.

But in further examining the matter, it is found, that at common law a forfeiture under a clause of re-entry for non-payment of rent (which

is to be distinguished from other breaches of conditions in leases for years), the rent must be demanded on the last day for payment thereof, upon the premises, &c., without which the landlord could not re-enter, but after which he might accomplish a forfeiture by indicating his intention to do so by entering under a recovery in ejectment or otherwise.

To work a forfeiture, therefore, in the one instance a *demand* must be made, such as I have mentioned; and it will be found equally necessary at common law, to make a like demand to effect a ferfeiture under the condition, declaring the lease void. Although after such a demand, a forfeiture may in that case at once ensue without entry, and although the right to inforce a forfeiture after demand duly made, where there is merely a right to re-enter, may be waived at any time before actual entry, which in the alternative instance, the forfeiture being complete upon demand made without more, cannot be waived by anything *ex post facto*, any more than after actual entry in the other instance.

Treating this lease at common law—was a forfeiture incurred by non-payment of the rent at the day, that the landlord could not or did not waive by the subsequent distress? If at common law, in such a case as this, a demand of the rent at the day. &c., was necessary to create a forfeiture as well as under the more usual clause of re-entry, then no such demand having been made, there has been no forfeiture.

Gilbert on Rents, 73, treating of the cases in which a demand is necessary, says, "the material difference is observable between a remedy by "re-entry, and a remedy by distress for the non-payment of rent. "where the remedy is by way of re-entry for non-payment, there must be "an actual demand made previous to the entry, otherwise it is tortious, "because a condition of re-entry is in derogation of the grant, and "the estate at law, being once defeated, is not to be restored by a sub-"sequent payment." And it is presumed the tenant is either residing on the premises in order to pay the rent for the preservation of his estate, unless the contrary appears by the lessor being there to demand it; and therefore unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be upon the land, ready to pay the rent, the law will not allow the lessor the benefit of re-entry to defeat the tenant's estate, without a wilful default in him, which cannot appear without a demand hath actually been made upon the land; and the demand inthese cases must be made on the day prefixed for payment, and alleged expressly to have been made in the pleadings.

Gilbert on Rent, 86-7, ib. 141; Ba. Ab. Rents I. 1, 2. For the difference between a condition and a limitation, ib. note; that it is the better way for the lessor to have a clause of re-entry for non-payment of rent, than a clause for the lease to be void, because there is no re-entry previous to determine an estate already void in itself; yet even in this case, if the lessor forbears to make an actual demand when the rent is in arrear, he may recover it by an action of debt or distress, and so continue the lease, because those remedies not being in defeasance of the grant, the lessor may pursue them without an actual demand as is already observed. Gilbert on Rents, 91. The time of demand is upon the last day of payment.

Gilbert on Rents, 3.—For the origin of the remedy by way of distress according to the civil law, in substitution of the forfeiture of the estate by

the feudal law, and is calculated to show how a distress may therefore operate as a waiver of the forfeiture.—Story Eq. Juris. S. 1317; Bac. Ab. Rent, I. 1, 2.

2 B. & C. 450; Doe Harris v. Masters. 4 D. & R. 45.—Where a lease contained a proviso for re-entry, although no legal or formal demand should be made.—Held, that an ejectment might be maintained without actual re-entry, and without any demand of the rent.

Bro. Ab. 429; Hobart 207, Cranley v. Kingsmill; Hobart 331, Hanson v. Norcliff.—In an action of debt, the plaintiff declares upon a lease for years, made by him to the defendant, reserving rents, and for the rent behind the action is brought. The defendant pleads that the lease was by indenture reserving the rent, prout with a condition that if the rent bebehind, then the lease to be void, and doth allege a default of payment of the rent, and so the lease determined. The plaintiff demurred, and it was resolved by the court, that this lease is not void without a demand, which therefore the defendant should have laid actually, and for want of it his plea was naught; and so it is at the election of the lessor and his heir to continue. or avoid the lease in such case. -W. Jones, 9 S. C.; Bac. Ab. Leases, H. 3; Plow. 70-1; Hutton 42, 114, ib. 13; Ba. Ab. Con. O. 2, 14; Marsham v. Goodere, Freeman 242; Borough's Case, 4 Co. 73; 3 Taunt. 251; Shelford's Real Property Acts, p. 127, at bottom; Broom's Legal Maxims, 78; Doe Wheeldon v. Paul, Jenk. 121, pl. 43; Moo. 291; 2 Mod. 264, Steward v. Allen, 5 Vin. Ab. Con. 3, c.; page 263, pl. 6 & 7; Cro. Jac. 144-5, S. P. ib. 56-7; r Saund. 287, note (16.) The difference between the case of the Queen and a subject, Cro. Eliz. 221, Finch v. Throgmorton; Popham 25, 53; 2 Leo. 134, 141; 5 Co. 56-7; 4 Co. 73; 3 C. & P. 613, Doe. Wheeldon v. Paul; at common law if three quarters' rent be due, the landlord to enforce a right of re-entry for non-payment must demand the last. quarter only.

These authorities seem to me to show, that regarded as conditions and at common law, a demand of rent at the day was equally required in both descriptions of conditions. A further question is, whether a covenant to pay the rent being also contained in the lease, and the condition itself being in the form of a covenant, alters the case, and dispenses with such a demand, and renders the lease valid, unless the tenant finds out the land-lord, and pays him at the day.

This distinction is pointed out in 5 Vin. Ab. Cond. z. c., page 263, pl. 7. Cro. Jac. 144-5, apparently S. C.; Molyneux v. Molyneux, 3 Taunt. 251.—Several cases—5 Co. 40; 2 Dougl. 477; 2 M. & S. 525; 2 B. & C. 490; 4 D. & R. 45, shew that a demand may be dispensed with by an express agreement, and it has thence apparently been inferred that it is implied in an express covenant to pay, or that the onus of paying without demand is thereby assumed by the tenant, and that he fails at the peril of forfeiture; especially where the party also covenants and agrees, that in the event of default in payment or performance of the covenant to pay, the lease shall be void. The present is a case of the last description.

Such covenants, however, being in favour of the landlord, the argument is strong, that the lease is only void at his election, and if so, that the breach of it on any particular occasion may be enforced or waived at his election.

Formerly a distinction was supposed to prevail respecting the necessity of an entry to work a forfeiture for non-payment of rent in leases for years; between leases containing the ordinary clauses, conditions or provisoes for re-entry, and those providing that they should be void in default of payment at the day, or of keeping the covenant to pay; a demand and entry being both requisite in the former, and demand only to the latter case; also between conditions declaring the estate void, contained in deeds importing freehold interests and in leases for years, an entry being deemed essential in the former but not in the latter. Engrafted on the doctrine, that for non-payment of rent a lease became void by its own terms on default in payment of the rent—was the rule, that of such a forfeiture there could be no waiver so as to continue the lease, though subsequent acts of the landlord might constitute a new lease, or a re-demise from year to year upon the terms of the old void lease.—Cornish on Uses, 44,

In connection with the consideration of waiver, is also to be borne in mind, the difference between leases, &c., void ab initio, and those determinable by conditions subsequent; also between those cases in which it is void equally as to all parties, and others in which it is only so at the election of the landlord. On this subject, some of the cases will be found referred to in the case of Doe Graham v. Newton, in this court.

I cannot say that I am satisfied, that at common law a covenant to pay rent at the peril of a forfeiture dispenses with the necessity for a demand at the day; for it rests with the landlord to avail himself of that covenant, as he would of a strict condition, and the intention to enforce it should be indicated in the same way, viz., by a demand at the day.

For the mere purpose of an action of covenant for non-payment of the rent, of course no demand is requisite; but to enforce the breach thereof, under the clause for voiding the lease as a forfeiture, in other words treating it as a condition, it would on principle be essential.

But in either event it still remains to be considered, whether the mere non-payment of the rent renders a lease so far void that the breach cannot be waived, and the lease be continued, by anything subsequently done by the landlord.

Formerly it was thought not, and many writers so state the law; but the modern and latest authorities seem to lead to a different result.—Co, Litt. 204. a, 215, a; Co. 64, Resolution 5; I Doug. 58, note (29); Ba. Ab. Leases, T. 2; I2 East. 444; Gow. 220; Doe Bryan v. Banks, 4 B. & A. 401; 2 Ch. R. 247, S. C.; I Star. 4II; Doe Taylor v. Johnson, I B. & Ad-428; Doe Flower v. Pick, I C. & P. 346; 7 Q. B. 287.

6 B. &. C. 519; 9 D. & R. 536, Arnsby v. Woodward—where the lease contained a proviso, that if the rent should be in arrear for twenty-one days after the demand, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should then be unexpired, should cease, determine and be wholly void, and it should be lawful for the landlord to re-enter, &c.—held that this, in the event of a breach of covenant, made the lease voidable and not void, and that the landlord was bound to re-enter, in order to take advantage of the forfeiture, and that he waived it by a subsequent receipt of the rent.—Littledale, J., page 524. "The clease was not void but voidable, and the landlord was bound to

"re-enter, in order to take advantage of the forfeiture, as in the case of free-"hold interests."

6 M. & S. 121, Read v. Farr.—A proviso in a lease for years, that if the rent shall be unpaid forty days, &c., although not demanded, the lease shall be void—does not make the lease voidable by the lessee by reason of his own default; and in debt on bond given by the tenant and defendant, conditioned for payment of the rent, the plaintiff may assign for breach the non-payment, &c., without shewing a demand of the rent—time and place being fixed for payment of the rent at the house of the lessor.

4 B. & Ad. 664, Roberts v. Davy.—License to dig mines, &c. with condition to cease and determine, and be utterly void, &c., in a certain event—held on general demurrer, that the word void meant voidable.

r Saund. 287. c, (4), last edition, note of Patteson and Williams, the editors. These authorities appear to be strongly opposed to, if not to overrule the distinction taken in the principal note above, between leases for lives and leases for years, inasmuch as they seem to establish, that although a lease for years contains a proviso that it shall be utterly void for non-payment of rent or other breach of covenant—yet it shall be regarded as voidable only, so that the landlord, by the acceptance of rent or the like, with notice of the breach, will waive the forfeiture.

4 Bing. N. S. 395, Malins v. Freeman.—A purchaser cannot rescind his own contract at an auction, on the ground that he refused to pay the auction duty, and that it is void under the statute; 17 Geo. III. ch. 50; see also statute r Eliz., touching ecclesiastical leases commented upon.

I Hare 109, 128, Bowsee v. Colby.—Where the landlord has entered, the lease is equally at an end in a court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void on non-payment of rent. The legal effect in one case is, that if the landlord re-enters, the lease is determined—in the other case it is determined without his re-entry; and in the latter case the contract is, that the non-payment of rent shall (alone) determine the lease.—Com. Dig. Confirmation, D.; Ib. Distress, D.; Ib. Condition; Ib. Rent, D. 3; Co. Litt. 201, b; 18 Vin. 482; 2 Cro. 145.

I M. & W. 402; T. &. G. 767, S.C., Doe and Nash v. Birch.—Where an agreement, that if the defendant did not erect a shop-front, &c., within three weeks from date, it should be lawful for the plaintiff to take possession of the premises, and that the agreement should be null and void—held that "null and void" made it voidable only at the election of the lessor, but that a mere demand of the rent by the plaintiff's agent did not constitute a waiver, at all events without proof that the lessor knew of the forfeiture at the time of such demand.

Jones v. Carter, r₅ M. & W. 7₁₈; the service by the lessor upon the lessee of a declaration in ejectment for the demise premises for a forfeiture, operates as a final election by the lessor to determine the term, and he cannot afterwards (though no judgment in the ejectment) sue for rent due or covenants broken after the service of the declaration. The proviso was in a demise for years—that for any breach of covenant i should determine and be utterly void, and the lessor be at liberty to reenter. Parke, B.—"Though the lease is declared to be void for breach "of covenant, it is perfectly well settled, that the true construction of

"the proviso is, that it shall be void at the option of the lessor, and conse"quently if he exercises the option that it shall continue, the lease is render"ed valid; if he elect that it shall end, the lease must be determined" again,
"and if once rendered void it could not be set up again. An entry or eject"ment in which an entry is admitted, would be necessary in the case of a
"freehold lease or of a chattel interest, where the terms of the lease provided
"that it should be avoided by re-entry. Whether any other act, unequivocal"ly indicating the intention of the lessor, would be sufficient to determine
"this lease, which is made void at the option of the lessor, we need not deter"mine, because an ejectment was brought, &c."—See ib. 726, Note of American Editor.

Doe Brian v. Bancks, 4 B. & A. 401.—A lease of coal mines reserved royal rent for every ton of coals raised, &c., and contained a proviso that the lease should be void to all intents and purposes, if the tenant should cease working at any time for two years; after the working had ceased more than two years, the lessor received rent; held, that a tenancy from year to year was not thereby created, the lease not being absolutely void, by the cesser to work, but voidable only at the option of the lessor, &c. Cornish on leases, 44, seems to question this decision, he calls it an anomalous case; Co. Litt. 204, (a).

Respecting the effect of a covenant to pay, and that in default the lease shall be null, see reference to 5 Vin. Ab., page 263, pl. 7; Cro. Jac. 144; and more especially to 3 Taunt. 251. See Ba. Ab. Leases, S. 2, where he speaks of the right of the landlord to waive any right that is merely personal and conventional.

I Chitty Prac. Law, 290, ib, 482.—Speaking of the difference between conditions for re-entry only and for avoiding the lease, and that in the former a waiver would set up the lease, which in the latter acceptance of rent or waiver would at most constitute a new tenancy from year to year—adds, "but "this distinction only applies to the breach of a condition, and not to a breach "of covenant, for in the latter case, whatever may be the terms of the clause of forfeiture, and whether it be in a lease for years or for lives, the act of the lessor may waive the forfeiture, and confirm the lease."—Hartshorne v. Watson, 4 Bing. N. S. 178.

Doe Harris v. Master, 2 B. & C. 492; 4 D. & R. 45: per Cur.—By the covenant in this lease, the defendant has dispensed with all such demand as the law would otherwise have required; there it was contained in the lease, "although and notwithstanding no formal or legal demand shall be made for payment thereof."

If the forfeiture could be waived—then did the distress for the rent in arrear amount to a waiver? A difference exists on this head between an acceptance of the rent or distraining for it. Acceptance of rent will not in all cases, though it will in some, constitute a waiver.—I C. & P. 346; 6 T. R. 220; Cow. 243; IH. B. 311, 2.

On this subject it is to be observed, that at common law a landlord could not distrain for rent after the end of the term, and it followed as a consequence, that if the lease was void, and so at an end, he could not adopt this remedy; but if he resorted to it, it was taken to admit a subsisting tenancy.—
3 Co. 64.

Afterwards the statute 8 Anne, ch. 14, sec. 6 & 7, allowed a distress within six months after the end of the term, since which a distress for rent, unless the whole in arrear be realized, is not construed a waiver of the forfeiture, even as respects the mere condition of re-entry, by reason of the statute.—4 Geo. 2 ch. 8.

In connection with the foregoing act, and its consequences, is to be taken the subsequent act of 4 Geo. II. ch. 28, sec. 2, dispensing with a demand at the day, and authorising an ejectment if six months in arrear, unless there be a sufficient distress on the premises.

Doing so it will be perceived that a distress is only regarded as not a waiverso far as relates to the remedy afforded by the last act, which dispenses with a demand at the day, &c., and makes the service of a declaration in ejectment equivalent thereto.

But as the defendant has entered of his own discretion, and not by eject ment under the statute, the question of forfeiture is to be treated of at common law, in which view a distress for rent seems to be a waiver, inasmuch as it treats the land as debtor, and the term as subsisting.—6 T. R. 220.

Brewer on demise of Lord Onslow v. Eaton, 3 Dougl. 230—Since the statute 4 Geo. II. ch. 28, a distress realizing only part of the rent is not a waiver being a step only to complete the remedy given by the statute. It was however admitted by Erskine in arguendo, and stated by Lord Mansfield, and Willis, J., that at common law the distress would have been a waiver. A distress for rent already due seems equivalent to the acceptance of rent accruing subsequently.—Cow. 804; Bull. N. P. 96; Selw. N. P. 650; Styles 483; Plow. 133; Adams on Ejectment, 138-9; Cow. 245; Burr. 1603; 9 Ea. 310; 10 Ea. 48.

Lord Loughborough, I H. B. 312, speaking of the effect as a waiver of a distress for rent accraed after the expiration of a notice to quit, said, there "could be no question of intention left to the jury, as the taking of a distress "was an act not to be qualified, and an express confirmation of the tenancy—Cro. Eliz. 3, 528, 553, 572; I Leo. 262; Moore, 246; Godb, 46; Co. Litt. 211, a, b; Cro. Car. 512; 3 Co. 64; Roscoe on Real Actions, 540-I; I Star. 411; I C. & P. 346; I B. & Ad. 428; 4 Bing. N. S. 176, ib. 384; 2 B. & A. 724; Co. Litt. 218, a, b; I Co. 174; 3 Co. 26; 5 M. & G. 726; 7 M. & G. 316; II Law. Jl. Exch. 313; 6 Jur. 326, S. C.; 3 A. & E. 188;

As to entry on one ground and justifying on another—7 T. R. 654; I Ea. 142; 4 Bing. 729; 10 Bing. 157; I Bing. N. S. 380.

DRAPER, J.—In this case there is a *covenant* by the lessee to pay rents, coupled with an express condition, that in default the lease shall be void.

Taken most favourably for the tenant, this is a condition making the lease voidable at the will of the landlord.

If it were a limitation, and therefore the lease became void on the default being complete, then the landlord might distrain at any time within six months from such determination of the lease, for rent accruing before its determination, as his interest and the tenant's possession still continued.—8 Anne, ch. 14.

Such a distraining being expressly consistent with the determination of the lease, does not *necessarily* imply any waiver of the forfeiture, or is any admission of a continuance of the term—especially if the distress

proves ineffectual for the recovery of the rent. Notwithstanding a distress, the right of election remains, for all that I can see, in the landlord; for if it be a condition only, making some act of the landlord necessary to show his election to determine the lease, still a distress made (which is insufficient) for rent, by reason of the non-payment whereof a right to determine the lease accrued to the landlord—would not waive that right.

If the condition had only in express terms given a right to re-enter, such insufficient distress would not prevent a recovery in ejectment; nor can it be more effectual to defeat the landlord, where any act evincing his election to determine the lease is done—as thereupon the lease is avoided.

Here, after a distress, admitted to be insufficient—the landlord being in possession by the entry to distrain, holds over, so that, as regards his legal authority to be on the premises in distraining, he became a trespasser, and there being no person in actual possession but himself, he refuses to re-admit the tenant. He had at that moment a clear right to elect to determine the lease, because the rent was unpaid contrary to the covenant and condition, and because the act of distraining was consistent with the lease being determined, and is not in itself an admission of an existing lease.

But a question arises, whether, as he distrained before he elected, and therefore before the lease determined, he can expel the tenant after a partial satisfaction of the rent; thus depriving the latter of the protection of the stat. 4 Geo. II., ch. 28, sec. 4, which would have entitled him to continue in possession, by payment of the arrears of rent and the costs of suit before trial, if the landlord had brought ejectment.—See Doe Wilson v. Phillips, 2 Bing. 13.

At present I think that the landlord's act, which on the facts is an obtaining peaceful pessession—the tenant being in fact out of possession—and not a forcible expulsion of the tenant, will have the same effect, as to putting an end to the lease, as if execution in ejectment for the forfeiture had been executed, when the tenant could only have obtained relief in equity, by filing his bill within six months after execution executed, as pointed out in the second and third sections of the statute 4 Geo. II.—See Doe Gardner v. Kinnaird, Law Times, 1st July, 1848, page 288.

At law, it appears to me, that treating this as a condition for re-entry, the lease had, by the act of the landlord, in thus holding the possession, been put an end to, the distraining not being an act necessarily admitting the lease to be in existence, just as it would have been, had there been a recovery in ejectment for the forfeiture, and no bill been filed for relief; and consequently that the lessor of the plaintiff had no estate in the premises when he brought this ejectment.

A fortiori—as a condition that the lease shall be void on the landlord's evincing his election to make it so—the tenant cannot, I think, in the face of this condition in his own covenant, insist that it is in force, and recover possession against the landlord, whose right to elect is not, that I can perceive, compromised, and whose election to determine the lease is unequivocally evinced. The tenant's interest was, in my opinion, at an end before he brought this ejectment. There are many cases which

s'new that a party having the legal and beneficial right—if he can obtain possession peaceably, though even by stratagem—may hold it.—Taylor v. Cole, 3 T. R. 295; 7 T. R. 431; 8 T. R. 354; 1 Bing. 158; 6 Taunt. 202, Butcher v. Butcher; 1 Man. & R. 220; 8 B. & C. 767; Withers v. Harris, 2 Lord Ray, 806.

McLean, J., concurred in opinion with the Chief Justice and Mr. Justice Draper.

Per Cur.-Postea to defendant.

DOE BALDWIN V. STONE.

Private Act of Parliament.—The provincial statute, I Wm. IV. ch. 26, vesting in a trustee certain lands as belonging to the estate of the late Laurent Q. St. George, has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve his trustee from the necessity of shewing title in the first instance.

Quare.—The effect of a succession of trespassers taking possession of deserted land at intervals, and not claiming under each other? The application of 52 cl. 4 Wm. IV., ch. 1.

This was an action by the heir-at-law of the late W. W. Baldwin, Esq., the trustee named in an act of the Legislature of Upper Canada, I Wm. IV., ch. 26, for managing the estates real and personal of the late Laurent Quelton St. George. It was brought to recover possession of the north half of Lot 22, in the 1st Con. of Percy, and for the parcels of land enumerated in Schedule B. of that statute.

At the trial, the proof of title in the lessor of the plaintiff was, 1st, a deed from Joseph Sparrow, 23rd of May, 1818, to Hugh C. Thomson, conveying this land to him in fee; 2nd, a conveyance in fee from Hugh C. Thomson's wife, 17th of January, 1822, to John S. Baldwin, Esq.; 3rd, a conveyance in fee from John S. Baldwin, Esq., to W. W. Baldwin, Esq., of this hundred acres and other lands; and then evidence was given that the lessor of the plaintiff was the heir of the last-mentioned grantee.

It was not shewn that Sparrow had ever any title to the premises, nor that he was in possession at the time of his making the conveyance to John S. Baldwin, Esq.

The defendant produced a patent from the crown, made in 1802, to Samuel Danforth, for the whole lot, the south half of which he had since sold to R. C. Wilkins, Esq.

It was proved that no one had, as actual occupant, paid taxes to the collector upon this hundred acres at any time, but that Mr. Baldwin, the trustee, had paid taxes upon it as wild land, during the last twenty years.

Danforth made a small clearing upon the lot more than forty years ago, and then left this province, and went to the United States; then, after an interval of ten years, one Brown occupied it for a short time, then Palmater, and after him Comstock made use of the land for four or five years. None of these persons lived on the land or claimed title to it; but residing on other land near it, they seem to have made use of the small piece of clearing which Danforth had made, and which lay neglected as common. No one but Danforth ever lived on it.

It was proved, but only by parol evidence of neighbours, that Comstock sold out to Sparrow, who never lived on the land, or made any use of it and who was proved to have said, that he had a writing from Comstock for the land, but considered the writing good for nothing. It seems to have been made about 1819 or 1820, and that the transaction, whatever it was, took place between Comstock and Sparrow, but there was no regular proof of anything having passed between them that would affect the title.

When Comstock, who was a mere squatter, ceased to make any use of the land, one Carter succeeded him, who was not understood to have any claim to it, but merely used the land, as the others had done, for three or four years, and died in 1832; then one Hall seems to have trespassed upon it; and seven or eight years ago, the defendant, Stone, began to work on the land, and has cultivated it since. For all that appears, he was, like the others, a mere squatter.

No account was given of Danforth, whether he is now living or not; and no attempt was made to prove that he had ever conveyed his interest to any one.

It was objected on the trial, that the production of the patent shewed the title to be in Danforth, and the plaintiff therefore could not recover.

The Chief Justice directed the jury, that a legal title had been traced down from Sparrow through Thomson to the lessor of the plaintiff, but what right Sparrow had to convey the land to Thomson was not shewn; and that Sparrow was not proved to have been in possession when he assumed to make the deed, nor at any time; that in ordinary cases, the party claiming under the deed to Thomson must fail, for want of evidence of Sparrow's title, but that there was room here to raise a question, whether the act of the legislature respecting Mr. St. George's estates should not be taken as a legislative recognition that the late W. W. Baldwin was seized of this land as his trustee—so as to throw upon any party claiming title the burthen of proving it, which no doubt it would be open to him to do. He directed the jury that no stress could be laid upon the fact of the trustee having paid the land-tax.

It was agreed by the counsel on both sides, that a verdict should be given for the plaintiff, with leave reserved to the defendant to move to enter a verdict in his favour, if the court should think the plaintiff not entitled to recover on the evidence.

The plaintiff had served a notice under the 52nd clause of our Real Property Act, 4 Wm. IV., ch. 1.

A. Wilson, for the lessor of the plaintiff. The Statute of Limitations cannot bar in this case, for there has been nothing but a succession of independent trespasses—no continued occupation for twenty years. When these successive trespassers left the land, the effect of their possession became immaterial; it could not be added to the possession of the succeeding trespasser, coming after an interval, and under no privity with the preceding one.

The St. George trust is a legislative recognition of a title in the trustee to this particular land, sufficient at least to call upon the defendant to shew a better right, if he has it. The producing an old patent whereby the crown granted the land, many years ago to one Danforth, neither shewed title in the defendant, nor out of the lessor of the plaintiff; for the pre-

sumption is, that the title which the legislature by their act has recognised as being in the trustee of Mr. St. George, was acquired through Danforth. The one is not inconsistent with the other.

D. B. Read, for the defendant. The private act of parliament establishes nothing. It is treated as nothing more than a recital of what the applicant for the act has represented. The intention and effect is to vest the land in the trustee, with the privileges and for the purposes set forth in the act, provided the circumstances respecting the title have been truly stated. It is not binding on strangers as evidence of title.—I Moo. & Walk. 417; 10 Bing. 405; I Cr. M. & R. 47; I Stark. Ev. 339.

ROBINSON, C. J.—This is clearly not a case to which the 52nd clause of our statute 4 Will. IV. ch. r, can be applied, for "whether the lessor of the "plaintiff is entitled in justice to be regarded as the proprietor of the land," or has really any claim at all to it, has trustee or otherwise, depends upon the right which Sparrow had to convey it to Mr. Thomson. The case or Doe dem. Lynes v. Crawford in this court, E. T. 1842, is a decision against applying that clause in any case of this description.

The substantial question is, whether, when the defendant put in evidence a patent to Danforth for this land, he can be held to have precluded the plaintiff from recovering by thus merely shewing the title in Danforth.

No doubt, in ordinary cases between party and party, that would be the effect, unless indeed possession had gone with the title to H. C. Thomson, and his assignees, in the intervening period, which it does not seem to have done for any part of the time.

As regards the possession, indeed there is in the opinion of my brothers, as I understand, room for question, whether any title that could be set up under Sparrow's deed, is not barred by the Statute of Limitations. If it must be held to be so, then there would be no need to consider any other point in the case; but I have not brought myself yet to that opinion.

Mr. Thomson no doubt was in a situation to assert his title in May, 1818, when he received the conveyance from Sparrow; and from that time to the present a succession of trespassers, with occasional interruptions, seem to have been making more or less use of the few acres that were cleared on this lot, just as suited their convenience; no one being on it, or claiming title in it, or asserting a right to exclude others from it, or maintaining in fact, so far as the proof went, an exclusive possession of the hundred acres; but one after another taking the liberty of using the kind of bush pasture which lay in common to be used by the first that came.

It is not my impression, that after the possession of any one of these meretrespassers had ceased, the time that he occupied can be made to affect the title of the true owner, by giving a new character to his occupation, which had ended before our new Statute of Limitations had passed, and giving it thereby a different operation from that which it would have had under the state of the law which existed while such possession was held.

We must proceed very cautiously in dealing with questions of this

kind; and I am not prepared to concur in any judgment that would hold the lessor of the plaintiff in this case barred by the Statute of Limitations hough if it were necessary to determine the point we might find that to be the legal effect of the evidence.

We are first to consider whether the plaintiff shewed a case on which he could be properly allowed to recover. He proved only, that in 1818, Sparrow, whose connection with the title was not shewn, and who was not in possess on by himself or his tenants, made a deed of this land to Thomson, from whom a title was deduced to the late W. W. Baldwin, but without anything (I think) expressed in the deed to Mr. Baldwin to shew that he had taken the title as trustee, or agent for Mr. St. George, or in any manner on behalf of him, or his estate.

In ordinary cases then, we must have held, that the lessor of the plaintiff had not made out a case, and his position was made so much the worse when the defendant proved a clear title by patent in a third party, Mr. Danforth, between whom and Sparrow no privity whatever was shewn, or attempted to be shewn, nor any foundation laid by proof of possession or otherwise for presuming a conveyance from Danforth, in support of plaintiff's title.

It occurred to me at the trial, that although in general the plaintiff's recovery would be defeated by thus shewing title in a third party, yet that, in this case, it might be reasonable to hold, that the legislature having included this very parcel of land in the schedule annexed to their statute, as land of which the late Mr. Baldwin was seised, as agent or trustee for Mr. St. George's Estate, we should take that as a prima facie title, being a recognition by the legislature of the fact of Mr. Baldwin's seising, sufficient to throw upon any one pretending better right, the onus of proving it. I was inclined to think that the shewing a patent made in 1802 to Samuel Danforth, did not at all interfere with the apparent title recognised by the statute in Mr. St. George's trustee, there being no inconsistency between the two facts, but abundant room for the inference that the land had been taken either directly from Danforth, or from some assignee of his in satisfaction of some debt due to Mr. St. George, and in the course of that very kind of agency which the statute recites.

Whether any stress can properly be laid on the statute, in support of the plaintiff's title, is the question which we have had to consider.

If the land had been part of the estate included in schedule A. appended to the statute, then the first clause of the statute would have applied to it; and the effect of that would be, that we must have admitted the legislature to have provided by their act, that if Mr. St. George either held or was deemed to have held this land at the time of his death, then it would, by virtue of this act, be vested in his trustee for the purposes mentioned in the statute.

But it is not under that clause, that this estate comes; it is embraced within the schedule B, which applies only to such lands as Mr. Baldwin is assumed, or as we must suppose, had shewn himself to have taken as agent, in payment of debts due to the estate. The third clause speaks of such lands only, it does not recite as a fact that Mr. Baldwin had taken or then held any particular lands, but divers lands, and then it provides that "all the lands enumerated in schedule B, which said lands have been here-

"tofore purchased, accepted, or taken by the said W. W. Baldwin or others "the agents of the said L. Q. St. George, in consideration, satisfaction, or "compromise of such debts, and not again sold or disposed of, shall be and "the same are hereby declared to be, held by the said W. W. Baldwin, in "trust to hold, sell, exchange, &c., from time to time for the uses, intents "and purposes expressed in the will of the said L. Q. St. George."

There is no saving of the rights of others inserted in either of the clauses to which I have referred; but in the last clause of the act, which provides, that all lands in the hands of Mr. Baldwin, as trustee, shall be liable to be sold in execution to satisfy any debts that may be due from the estate of the late Mr. St. George, there is inserted a "saving to every person what- soever other than his Majesty, his heirs and successors, or the heir of the said St. George, his widow, and the trustee, Mr. Baldwin, their heirs, &c., of all his or their rights, title and interest, claim and demand whatsoever, of, in or to the said premises, or any of them, every or any part or parcel thereof, anything in the said act contained to the contrary in anywise not- withstanding."

Whether this saving was intended to apply to the whole act, or only to that clause, is not apparent. In reason there should have been a saving applicable to all the provisions of the act. According to the more obvious construction of the words, however, that saving applies only to any lands that may be sold to satisfy any debt of the estate.

But taking it only on the effect of the third clause, in conjunction with the schedule, my brothers are of opinion, in which, upon consideration, I concur, that the statute cannot properly be taken as furnishing any evidence of title; and that the trustee, and his heir-at-law, are left upon the same ground asother plaintiffs in ejectment, and must shew that they have a title. "All the "lands in schedule B., which lands have been heretofore purchased, &.c., by the "said W.W.B.," cannot, we think, fairly, and with a just regard to the rights of others, be taken to amount to an assertion by the legislature, that the lands in schedule B. had been actually purchased and acquired by the agent; but that the legislature should be only understood as saying, that all such of the lands mentioned in that schedule as the agent shall have purchased, &c., shall be vested, &c., or that the lands in the schedule, if it shall be made appear that they have been acquired, &c., shall be deemed to be vested in Mr. Baldwin.

This reading of the statute is in accordance with the view taken by courts of justice, of the intention and effect of private acts of this description, which are not looked upon in general as evidence of title binding upon strangers.

This does not seem either to be a case for straining the effect of the act beyond what the rule of law strictly warrants: for there has been a very long omission to advance the claim, though others were usurping the possession; and is was proved that Mr. Sparrow is living and in this province, so that we cannot suppose there could be any difficulty in ascertaining and shewing what his title was, if he really had any.

What I have said is independent of the general question, whether a private act of parliament, as this undoubtedly is, can be received as any evidence of title in favour of the person on whose application we must suppose it to have been passed.

The effect which courts of law and equity seem willing to concede to such acts, seems only to be this, that they are looked upon merely as qualified declarations of the legislature, not binding on the rights of strangers; the enactment being grounded only on the applicant's own assertion of title, to the correctness of which the legislature cannot be supposed to have pledged itself. In other words, that nothing more is intended by such statutes, than to afford to the applicant certain priviledges or facilities in regard to the estates mentioned, provided he has the right which he represents himself to have. - 8 Co. 138; 12 Mod. 384; 11 Jurist, 770; 1 Moo, & Mal. 411; 10 Bing. 404; 1 Cr. M. & R. 47; 1 Stark. Ev. 339; 4 M. & S. 542; 8 Co. 274; 2 Brownl. 323, 327; Golb. 168, 170; Cro. Eliz. 808; 2 Andrews, 190.

MACAULAY, J .- It is first to be considered, whether the act of I Will. IV., ch. 26, passed the 16th of March, 1831, aids the title of the lessor of the plaintiff, so as to afford prima fasie evidence thereof as against the defendant.

It is entitled an act for vesting the estates which were of the late Laurent Quelton St. George in William Warren Baldwin, and for declaring the trusts on which certain other estates are held by the said W. W. B., &c. It recites, that the said St. George was an alien—it also recites his will; that the said W. W. B. had been his agent and administrator, &c.; that he, in his lifetime, had been seised and possessed of divers estates, real and personal, and that the said W. W. B., as such agent, &c., had accepted and taken divers lands in compromise of debts, &c.; and that it was desirable that the said lands and real estate, whereof the said St. George died seised, should be vested in the said W. W. B. in trust, &c. It is enacted by sec. 1, that all and singular the lands, &c., mentioned and enumerated in the schedule thereto annexed, marked A., and which were held, or deemed to have been held, by the said St. George as his chattels, shall be and the same are hereby vested in the said W. W. B., his heirs and assigns, to hold the same to the use of the said W. W. B., his heirs and assigns, in the like estate, as the same were or would have been had and held by the said St. George had he been a natural born subject, upon the trusts therein mentioned.

Section third-reciting that the said W. W. B., as such agent of the said St. George, &c., in the compromise of debts due to the latter, or to the said W. W. B., as his executor, hath accepted and taken, in compromise and satisfaction for debts, &c., divers lands, &c., and that it was desirable to declare the trusts upon which the same are held. It enacts that all and singular the lands, &c., mentioned and enumerated in the schedule thereto annexed marked B. (which lands, &c., have been heretofore purchased, accepted or taken by the said W. W. B., or others, the agent of the said St. George, in consideration and satisfaction or compromise of such debts, and not again sold or disposed of,) shall be and the same are hereby declared to be held by the said W. W. B. in trust, to hold, sell, exchange, dispose of and convey, &c.

The land in question (north half of 22, 1st concession Percy,) is in

Section 6 at the end concludes, by "saving and reserving to all and "every other person or persons whatsoever, bodies politic or corporate, "their heirs and successors, all his or their right, title and interest,

"claim and demand whatsoever, of, in or to the said premises, or any of "them, or any part or parcel thereof, anything herein contained to the "contrary thereof in anywise notwithstanding."

That this act would not take away the right of any other, though the saving clause had been omitted, is shewn by \$ Co. 138, Barrington's case.

It is a private act notwithstanding the P. S. r Will. IV., ch. 1, sec. 2, and 7 Vic. ch. 4, require it to be judicially noticed. The former distinguishes between public and private acts; and it is to be construed most strongly, if anything, against the plaintiffs.—2 B. & Ad. 762; 2 M. & G. 175, Priestly v. Foulds.

Lucy v. Levington, I Vent. 176, Hale.—"Every man is so far party "to a private act of parliament as not to gainsay it, but not so as to give "up his interest. This is the great question in Barrington's case, 8 Co. "158; the matter of the act there directs it to be between the Forresters and the proprietors of the soil, and therefore it shall not extend to the Commoners to take away their common. Suppose an act says, "whereas there is a controversy concerning lands between A. & B., it is "enacted that A. shall enjoy it; this does not bind others, though there be no saving, because it was only intended to end the difference between "them two."

Dawson v. Paver, 11 Jurist, 766, 770. per Wigram, V. C.-" Where -4' an act of parliament in express terms, or by necessary implication, "empowers an individual to take or interfere with the property of another, "and it appears to the court, upon a sound construction of the act, that " such was the intention of the legislature, the court is bound to give effect to "the decrees of the legislature when thus clearly expressed. But where "an act of parliament simply enables an individual or individuals to deal "with property of his or their own for their own benefit, and does not, in " express terms, or by necessary implication, empower him or them to take "the property, or to interfere with the rights of others, the case is deter-"mined upon very different considerations. In the latter case the dis-"tinction between a public and a private act of parliament becomes "very material. Public acts, as it is laid down in the books, bind "all the Queen's subjects; but private acts, that is local and per-"sonal acts, as is said, do not bind strangers, unless such intent is ap-"parent in the act, either by express words, or by necessary implication. "And whether an act is public or private, does not depend upon any "such formal considerations, as whether it has a clause declaring that it "shall be deemed a public act, but upon the substantial considerations of "the nature of the case." After referring to several cases, he proceeds: "All the cases leave the proposition untouched, that an act of parlia-"ment not being a public act, will not bind the rights of strangers, un"less by express words, or by necessary implication, the intention can
"be collected. It is a question of construction."

In 4 M. & S. 532, the King v. Sutton, the utmost that was decided was, that the preamble of a public act of parliament was evidence to go to the jury. Lord Ellenborough said, "I do not say how far this evi"dence was conclusive; I only say that it was admissible." Bayley, J., at page 549, expresses himself to the same effect, and Co. Litt. 196, is referred to.—I Star. Ev. 164; I Phillips, Ev. 300; 2 ib. 234.

12 Mod. 384, Anon. per Cur.—Anact of parliament reciting J. S. to be heir, does not make him so.—3 Burr. 1626.

In Moo. & Mal. 421, Butt v. Beales, 423; it was said by the attorney-general, arguendo, that these private acts have always been treated as mere contracts between individuals, and their recitals are of no more value than the recitals of any private deed; they in no way bind strangers. And Lord Tenterden said, "that though declared to be a public act, the clause only applied to the forms of pleading, and did not vary the general nature or operation of the act."—10 Bing. 404; 6 A. & E. 548; 1 M. & W. 520; ib. 529, 30.

Now in this case the statute does not in the preamble or recitals suppose or state that W. W. Baldwin had a valid, or any title to the lands in schedule B. It recites that he had in the compromise of debts accepted and taken divers lands, &c., which lands (in schedule B) had been purchased, accepted, or taken by him in consideration, satisfaction, or compromise of such debts, and that it was desirable to declare the trusts on which they were held.

Then does the enacting part recognise or confer any other or better title than he previously had? I think not. The object is not like sec. 1, to affect the title at all, but to declare the trusts upon which the lands should be held, i. e. held on trust.

The object, scope, and intent of the act, from beginning to end, was merely to confirm and vest in W. W. Baldwin the title to the lands of which St. George died seised, in the like estate as the same were or would have been held had he been a natural born subject, and to declare the trusts on which certain other lands should be held by him and saving the rights of all others.

Such an act does not appear to me intended or calculated to fortify or strengthen, or cure defects in the title to any of these lands, otherwise than as they were liable to be affected by reason of the alienage of St. George. It would be contrary to the rules and principles of construction applied to private and personal statutes of this kind to hold otherwise.

I do not think the act is prima facie evidence, or any evidence of title as against strangers. If it was prima facie evidence, the plaintiff, would probably be entitled to recover, as the defendant shows no title in himself except possession, by virtue of the notice given under the statute 4. Wm. IV. ch. 1, sec. 52.

But even admitting the application of that clause to the circumstances of the present case, it becomes a question whether the previous part of the same clause, touching the limitations of ejectments, would go to exclude it.—See Cameron's Rules, 370, and note; Doe Lynes v. Crawford, E. T. 1842.

The plaintiff really shews no title. The evidence shews a patent of grant to Danforth in 1802, followed by actual settlement, that he afterwards left the province, apparently before the war of 1812. Of course the possession and estate continued in him, notwithstanding his departure. Then one Brown entered on it, without pretending any claim for two years, dispossessing Danforth to the extent of the improved part, at all events. Then Palmatiere, who lived on a lot near the premises, enjoyed the cleared part for two or three years, as a mere-

squatter however. Then Comstock, who lived on the adjoining lot, cut hay off the cleared part, and pastured it, but as a squatter, for about five years; while he was in possession, apparently, one Sparrow, not being possessed, said in 1819 or 1820, that he had a writing from Comstock for the place but considered it good for nothing, but he never lived on the lot or in any way used it, and no writing from Comstock is produced or proved. On the 23rd of May, 1818, he being out of possession, and with no paper title that appears, beyond his bare assertion of having a writing from a person who himself had nothing beyond a mere possession, made a deed of the land to H. C. Thompson, who on the 17th January, 1822, made a deed to J. S. Baldwin, who on the 13th September, 1823, made a deed to W. W. Baldwin, without any of them ever having been in possession, and only claiming title under deeds, that, so far as we see, could only operate to pass the estate by the operation of the Statute of Uses; or such estate as the parties making the same were respectively seised of. These deeds could not proprio vigore operate to pass the estate by wrong, and as rightful conveyances, seem to me inoperative for want of title in the parties respectively executing the same.

How long Comstock remained in possession, does not appear; but one Curtis occupied after him, and remained three or four years, till he died in 1832, so that he must have been in possession at the time the act r Wm. IV. ch. 6, was passed (16th March, 1831.)

When the defendant entered is not clear; it is said in evidence, that he entered before, or soon after, 1837. All these parties seem to have occupied independently.

Adverting to the statute 4 Wm. IV. ch. 1, it will be seen that if any right of entry ever accrued to Sparrow, under Comstock or otherwise, it so accrued in 1819 or 1820, or rather must have accrued before the 23rd of May, 1818, if the deed to Thompson could be of any value.

At all events the right of entry accrued to Thompson in 1818, and as the deed from Sparrow would not impart possession by operation of law, and as Comstock was in all probability then possessed, an entry was essential to give effect to the deed; at all events the right accrued then, and the possession did not pass by virtue of the deed alone. Still further, the right of entry of John Baldwin, and of W. W. Baldwin (if ever) accrued in 1822 and 1823; and between 1818, and that period, Curtis had occupied three or four years and died in possession; and we find the defendant possessed tor ten years or more, last past.

The act (sec. 16) says no person shall make entry or bring an action to recover any land but within twenty years next after the time at which the right to make such entry, or bring such action (where the person claiming shall claim in respect of an estate or interest in possession, granted or otherwise assured by an instrument other than a will to him, or some one through whom he claims, by a person being in respect of the same estate or interest in possession of the land, and no person entitled under such instrument shall have been in possession) shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession by virtue of such instrument, &c.

Had the plaintiff, or those under whom he claims, ever been in possession, it might, (upon proof thereof) as against the defendant, be a sufficient title, if within twenty years before action brought.

I do not consider the case within the spirit and intent of the 4 Wm. IV. ch. 1, sec. 52. That clause, reciting that plaintiffs in ejectment, brought against persons who are merely intruders, are subject to be defeated in the recovery of lands to which they have just claim as purchasers or heirs, on account of some want of technical form in their title, or some imperfection, not affecting the merits of their case, and of which it is desirable that mere strangers to the title, having no claim or colour of legal claim to the possession, should not be encouraged or permitted to take advantage-enacts, that upon service of notice, in the form therein prescribed (and which was done in the present case) if upon the trial the evidence of title given by the lessor of the plaintiff, shall shew to the satisfaction of the court, that he is entitled in justice to be regarded as the proprietor of the land, or is entitled to the immediate possession thereof for any term of years, but that he cannot shew a perfect legal title by reason of some want of legal form in any instrument produced, or by reason of the defective registration of any will or instrument produced, or from any cause, not within the power of the lessor of the plaintiff to remedy by using due diligence—it shall be competent to the jury, under the direction of the court, to find a verdict for the plaintiff. unless the defendant or his counsel, upon being required by the other party so to do, shall give such evidence of title as shall shew that he is the person legally entitled, or does bona fide claim to be the person entitled to the land by reason of the defect in the title of the lessor of the plaintiff, or that he holds or does bona fide claim to hold under the person so entitled.

Now the defect in the plaintiff's title does not arise from some want of technical form, or some want of legal form, in the instruments produced, or some imperfection not affecting the merits of his case, but from a substantial defect of title, which is only a paper title derived from parties not having any title to transfer, and unaccompanied or followed by any actual possession; nor is the plaintiff entitled in justice to be regarded as the proprietor of the land, unless mere lapse of time can be held to aid a mere paper title unsupported by any possession or enjoyment, which I do not conceive it can; and were the title shewn prima facie sufficient to impart seisin of the estate and right to the possession thereof, I apprehend that the Statute of Limitations would even then interpose an insuperable obstacle to the plaintiff's recovery, for notwithstanding the provisions of the 52nd section, I consider that the prior clauses of the same act, respecting the limitations of the action of ejectment, apply to cases that might otherwise come within that section, and that when it can be made available it must be under circumstances in which the plaintiff would not have been barred by the Statute of Limitations, had the title by which the action is supported been originally good.

When, by reason of want of possession and lapse of time, the Statute of Limitations becomes available to the defendant, or party in possession, as a defence, it cannot be said, that the plaintiff is subject to be defeated on account of an imperfection (in his title) not affecting the

merits of his case, or that he is entitled to the aid and benefit of the 52nd clause upon any ground contained therein.

For all that appears, the legal estate to the lands in question is in Danforth, the grantee of the crown, if living, or his heirs or devisees if he left heirs, or a will, should he be dead.

The Statute of Limitations might not operate against him, or those entitled under him, by reason of his or their absence from the province, without having been so absent for the period of forty years since the original grantee was dispossessed by others entering wrongfully upon the premises after he had left them vacant; or it may be, that the estate is liable to be resumed by the crown should Danforth have died intestate, and without heirs capable of inheriting, but that does not appear. If so, however, the plaintiff (although he does not claim or shew any title derived from or under Danforth) might, through the medium of an inquest of office, obtain a valid title by a re-grant from the crown, should the Queen be of opinion that he has a just claim to the estate in fee under a former purchaser. But at present I do not think the title one that in law can warrant a recovery.

McLean, J., and Draper, J., concurred.

Per Cur.-Rule absolute...

HENDERSON V. NICHOLS.

**Held, per Cur., upon the following clause at the end of an agreement:—

"And for the performance of this agreement each party binds himself to—
"the other in the penalty of 501., liquidated damages, and not as a penalty,—
"which 501. shall be forfeited by him who fails to perform this agreement,—
"and shall be recovered the one of the other in an action of debt after one—
"month from this date, on default made by either party"—that the 501.
was a penalty, and not liquidated damages—and that the plaintiff was therefore right in bringing covenant upon the agreement—and not debt.

*Held, also—that upon the agreement (set out as below), the covenanter, and not the covenantee, was the party to prepare the papers for the Bishop of Toronto to execute.

Quarre.—Where a plaintiff, upon an alleged breach of an agreement, seeks to recover compensation, not in the shape of general damages, to be left to the discretion of a jury, but in the shape of particular damages, specially contracted for by the agreement itself—Should he not aver in his declaration notice to the defendant, before action brought, of such particular damage, and the amount?

This action was covenant, on a sealed agreement, dated 21st August, 1849, by which the defendant agreed to sell to the plaintiff lots Nos. 30 and 31, on Carlton Street, in Toronto, for which the plaintiff was to pay in the manner stated in the agreement.

In the contract it was recited, that the defendant had contracted for the two lots to be purchased by him from the Bishop of Toronto, but had not yet received a deed of them; and the defendant covenanted with the plaintiff, that he would procure the Bishop of Toronto to give to the plaintiff, either his bond for a title or a lease of the two lots with a right of purchase, or a bond or lease for each lot separately, if the plaintiff should prefer it, which bond or lease, or bonds or leases,

as the plaintiff might prefer, the defendant covenanted he would obtain within a month from the date of the agreement; and the defendant covenanted to pay the plaintiff all damages, costs and charges, including the plaintiff's, loss of time, and expenses paid to counsel, and his loss of bargain, which he might suffer or be put to, by reason of the defendant's default to obtain a bond or bonds or leases according to the covenant.

The plaintiff then averred performance on his part, and readiness to perform, &c.,; and charged as a breach, "that although he did on the "19th of September, 1849, (i. e. within the month.) request of the "defendant to procure the Bishop of Toronto to give his bond or lease "for the two lots with privilege to purchase, and not separate bonds or "leases; yet that the defendant did not procure such bond or lease, "according to his covenant."

And the plaintiff charged as a further breach of the agreement, that, in consequence of the defendant's default, he was put to great damages. costs, losses, charges and expenses on occasion thereof, to wit, 201 in paying counsel for drawing writings and agreements, and abstracts of titles and deeds, and for advice about the plaintift's performance of his part of the agreement, and in endeavouring to compel the defendant to perform his part, and for expenses of divers journeys and attendances for that purpose, to the amount of the other 201; and in preparing to take possession of the two lots, and to build on them, and in advertising and attempting to sell them. And he laid damages for loss of sale to certain persons to whom he had contracted to sell the lots, whereof the defendant, on the 2nd December, 1846, had due notice. And he averred that the defendant had not paid the said damages, costs and expenses; and that so he had broken his covenant, to the plaintiff's damage of 4001.

The defendant pleaded, 1st. Non est factum.

2ndly and 3rdly. Non-performance of certain acts to be done by the plaintiff.

4thly. He denied that the plaintiff had within one month declared his election to have one bond or lease for the two lots from the Bishop of Toronto.

5thly. He denied notice of his election.

6, 7, 8, were pleas offering issues again on the above facts.

othly. He denied that the plaintiff was put to any damages, costs, losses, charges or expenses, by any default or omission of defendant within the true intent and meaning of the covenant.

nothly. That all the damages, losses, &c., which the plaintiff sustained were of his own wrong, and not by the default or omission of the defendant.

defendant.

11thly. He denied that he had due and proper notice of such damages, &c.

The agreement being produced at the trial, was found to contain this clause at the end: "And for the performance of this agreement, each "party binds himself to the others in the penalty of 501., liquidated "damages, and not as a penalty, which 501. shall be forfeited by him who fails to perform this agreement; and shall be recovered the one of the "other, in an action of debt, after one month from this date, on default made by either party."

The defendant gave evidence that he had requested the defendant to procure a bond or lease from the Bishop of Toronto for the two lots; and that the defendant had promised to do so, but had wholly failed. He proved also, that he had done all that it was incumbent on him to do; that he had had a deed prepared of a lot, which he was to convey to the defendant in part payment; that he had paid an attorney 2l. 10s. for his services in the matter; that he had given notice to the defendant that he had paid money to his attorney, but did not name any sum. He proved also, that he had advertised the two lots for sale, relying on the defendant's performance of his contract; that persons who desired to purchase had paid a land agent about 10l., for services which he had been employed by them to render in that matter; and that they now looked to the plaintiff to be reimbursed; that he had entered into a contract with a builder to put up a house on one of the lots, but had not paid anything in consequence.

It was not proved that notice was given to the defendant, of any of these latter claims for damages, nor any sum demanded from him on account of them before this action was brought.

The defendant's counsel moved for a nonsuit, 1st. Because the plaintiff could only sue in debt for the 50l.

2ndly. Because no bond or instrument was shewn to have been prepared by the plaintiff, to be executed by the Bishop of Toronto.

3rdly. Because the plaintiff did not shew that he had within a month given notice to the defendant what instrument he would desire to have.

4thly. Because no notice was given to the defendant before action brought, of the amount of damages claimed.

The learned judge over-ruled the objections, telling the jury that the plaintiff was entitled to some damages, for he had proved that he had paid money to counsel and for advertising, and had been put to a good deal of trouble and inconvenience.

The jury found for the plaintiff, 20l. Leave was reserved to movefor a nonsuit, if it should be held a fatal variance, that the plaintiff had omitted the provisions about the penalty, and had sued for damages at large.

H. Eccles obtained a rule for a nonsuit, upon the grounds mentioned above, and cited 1 Ch. Pl. 336; Prindle v. McCann, 4 U. C. R. 228; Meredith v. Culver et al., 5 U. C. R. 218.

Durand shewed cause, and cited 1 B. & P. 346; 6 Bing. 141; 9 M. & W. 678; 4 Burr. 2225.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the 50l. in this case was clearly a penalty, and not merely liquidated damages; for, in the first place, it is expressly so called by the parties in one part of the agreement, though they call it liquidated damages in another part; and as the courts always construe it to be a penalty, when they can do so, in order that it may be relieved against, if the effect of exacting it would be unjust, we should treat that as a penalty which the parties have in one part of the sentence expressly called such.

And on other grounds, it would be appropriated.

And on other grounds, it would be proper at all events to treat it as a penalty. The plaintiff was, in our opinion, in a condition to bring covenant as he has done, claiming damages at large for the alleged.

breaches, and his omission to notice the clause about the 50l. was no variance in setting out the instrument.

Secondly: we consider that on this argument it was not the plaintiff who was bound to prepare the papers which the bishop of Toronto was expected to execute, but he had only to give notice whether he would exact one or more bonds, or one or more leases; and the defendant engaged to procure the one or the other, as the plaintiff might prefer, within a month.

Thirdly: the proof that the plaintiff had given notice within a month of the kind of instrument he would prefer, was perhaps not very precise, but was legally sufficient; and the defendant by his conduct waived any question about the exact time, for he engaged to procure the paper, when he was told what would be accepted, but yet failed in performing his promise.

The leave reserved to enter a non-suit, was only on the ground of variance, that is on the first objection, and does not extend to this last exception; and looking at the evidence that was given, we should certainly not be promoting the ends of justice by granting a new trial on any such grounds not moved at the trial.

Fourthly: as to the want of proof of notice to the defendant, of the particular damages which the plaintiff claimed under that stipulation in the agreeement, which binds the defendant to pay all damages, costs and charges, including loss of time and expenses paid to counsel, &c., in case he shall fail to procure the assurance which he undertook for—I incline still to the opinion which I expressed in giving judgment on the demurrer in this case, that in order to entitle himself to recover under this express stipulation, the money which he has paid to his attorney or counsel for costs, and any other expenses, the plaintiff should have given notice to the defendant before action brought of the particular damage, and the amount.

I do not see why it does not come under the principle laid down in Harris v. Ferrand, Hardress 42, and it is reasonable that in such a case notice should be given. If the plaintiff had sued on the covenant generally, that is merely setting out the breach, and claiming general damages in consequence, then undoubtedly he could have recovered without any averment of notice such general damages by reason of the breach as the jury in their discretion might give him; and I do not say that he might not have been allowed to recover, as part of his general damages, compensation for the very charges in question; but when he sues for those charges as money which he is entitled specifically to have paid him, not by the discretion of the jury, but because the defendant has specially engaged to make that particular damage good according to its actual amount, then it seems to me that in strictness he should give · the same evidence, in order to entitle himself to that precise sum of money under that special undertaking, as if the defendant had signed an agreement only to this effect, that he could procure him the assurance by the day, or would pay him all such expenses as he should be put to, &c., and in that case I consider that the decisions in England require that the expenses incurred and the amount, being matters clearly within the knowledge of the covenantee, and not of the covenantor, he should make

his claim known, and the amount, before he can charge the non-payment of that amount as a breach of such specific undertaking.

My brothers, however, as I understand, have doubts on that point; and as both the agreement and the pleadings on the record entitled the plaintiff to some damages in this action, by reason of the breach, whether any notice was given or not of these particular damages, and as the verdict is only for 201, which is much within the sum which the parties themselves seem to have intended should follow the breach, though the intention was defeated by using the word penalty, we are of opinion that this rule should be discharged with costs.

Per Cur.-Judgment for plaintiff on demurrer.

DOE DEM. GILDERSLEEVE V. KENNEDY.

A. according to the statute 8 Geo. IV. ch. 1, surrendered to his Majesty, in consideration of 636l. 5s. 5d. received by him, "all that parcel of land "overflowed and covered with water, being composed of part of lots 37, 38, "39, in the first concession of the township of Kingston, containing by "admeasurement 462 acres more or less, and more particularly described "in the plan thereto, hereunto attached, to the intent that the said land "and premises covered with water shall forever hereafter be vested in "and enjoyed by his Majesty, his heirs and successors, free from all in-"cumbrances."

There was annexed to the deed a plan verified by one Burke, the surveyor who made it, by a certificate signed by him on the face of the plan, in these words, "I do hereby certify that the above diagram is drawn from actual "survey, and in actual accordance with the deed held by the proprietor, "and that there are 462 acres and 16 roods permanently covered by the "waters of the Rideau Canal."

Across the land from one side to the other was drawn an irregular line exhibiting on the one side (which was the front end of the lots) the 462 acres surrendered to the government as being covered by the over-flowing of the canal; and on the other side, or in rear of this line, 1232 acres, which is marked "land."

Afterwards A. conveyed to P. all those certain parcels of land "in the town-"ship of Kingston, and being the rear parts of lots 37, 38, and 39, as laid "down on a certain plan drawn by Mr. Burke the surveyor, in the fifth "concession of the township of Kingston, and by the said Burke stated to

"contain 123½ acres."

The land surrendered to the crown had been paid for to A., at a price per acre, assuming to contain 462 acres, according to Burke's survey.

But it turned out afterwards that the plan did not correspond with the fact, the survey being extremely inaccurate, for that there was not as much land

covered with water as the plan represented, by 141 acres.

Held, per Cur., that the deed made to B., carried only such land (1231 acres) as upon the scale of measurement on which the plan was framed, formed the area in the irregular line drawn across the lots, without regard to the fact of what portion of the lots was actually covered with water, and that the whole 462 acres had, under the deed of surrender, vested in the crown.

ROBINSON, C. J., dissentiente, who held:

1st. That the plan must be regarded as part of the deed, and read as part of the description in both the conveyances.

2ndly. That the deed to B., taken with the plan, shewed clearly, that what was meant by "the rear part" of the lots, to be conveyed to B., was all the land back of the line, which marked the rear or northern boundary of that before surrendered to the crown for the use of the canal.

3rdly. That in order, therefore, to determine what could be held under this grant of the rear part, it was necessary first to decide what had passed to the crown by the surrender.

4thly. That, by the surrender, the crown only acquired that portion of the land which was covered with water, both the deed and the plan shewing that nothing more was intended to pass; and that the surveyor having laid it down inaccurately on his sketch, according to his scale, and having miscalculated the number of acres, was a mere falsa demonstratio, which could not over-rule the more substantial part of the description.

5thly. That the effect of the first deed was to vest in the crown all the portion of the land over-flowed by the canal; and that the second deed

conveyed to B. all that lay in rear of the water mark.

This was an action for ejectment, brought to recover a portion of lots 38 and 39, in the 5th concession of the township of Kingston.

The whole of these lots, and also lot 37, had belonged to Thomas Markland, who had surrendered a portion of the m to the crown, for the purposes of the Rideau Canal; and had afterwards made a sale to one sharp, which he intended should cover all the remaining portion of the lots.

The lessor of the plaintiff claimed under Sharp's title.

The defendant set up no title in himself, but contended that the deed made to Sharp could not convey to him all the land which the lessor of the plaintiff claimed to hold, but that 140 acres of it which was in dispute in this action, had become vested in the crown under the deed of surrender, made by Mr. Markland before he sold to Sharp.

The case was tried at Kingston, before the Chief Justice, who considered that the crown had acquired by the surrender only such portions of the land as were covered with water, and that the plaintiff was entitled to recover.

The verdict, however, was given for the defendant.

The facts of the case are minutely stated by the Chief Justice.

Smith, Q. C., of Kingston, obtained a rule for a new trial, on the law and evidence; contending that the land being acquired under the Rideau Canal Act, for the use of the canal, and the deed and plan shewing that all that was intended to be surrendered was that portion of the land which the canal covered, nothing more would pass, notwithstanding the absurd blunder which the surveyor had made in his plan.

McKenzie, of Kingston, shewed cause.—He relied on the plan as conclusive in favour of the position, that 462 acres were surrendered to the crown, because the scale shewed that the area, as exhibited in the diagram, contained the quantity by actual measurement, and it was therefore immaterial whether the land so surrendered, according to a certain description, is covered with water or not.

Robinson, C. J.—The action is for parts of lots 38 & 39 in the 5th concession of Kingston, described in the consent rules as "those parts of "lots 38 and 39, in front, or south of the rear parts of said lots, commencing on the westerly side line of 38, 22 chains from the north-west angle of 38; thence south 83 chains, more or less, to the south-west angle of lot 38; thence east along the front of the said 5th concession 38 chains, more or less, to the south-east angle of lot 39 thence north along the easterly side of lot 39, 83 chains, more or less until within the distance of 22 chains from the north-east angle of lot 39; thence west across the said lots, 38 chains, more or less, to the place of beginning, and containing by admeasurement 328 acres, more or less."

Lots 37, 38, and 39, were laid out on a plan of survey, which was designed to make them each a two-hundred acre lot, according to the usual method of laying out land, when the township was surveyed, in the proportion of about 19 chains and some links in width, by 105 in length. Upon actual measurement the three lots appeared to be about 57 chains, 88 links in width, giving to each 19 chains, and nearly thirty links.

The defendants, by the consent rule, dispute the plaintiff's title to any larger portion of the land than the rear or northern 22 chains of the two lots 38 and 39; in other words, they undertake to shew that he has no right to the possession of any part of those lots which comes farther south than at the end of 22 chains from their rear or northern boundary. The plaintiff, on the other hand, contended at the trial, that he has a right to the possession of all that part of lots 38 and 39, which is not covered with water; in other words, that his right covers all that part of the land which lies between the rear of the lots and the water line of the Rideau Canal.

The question turns upon the following facts: The Rideau Canal being a public work, undertaken by the government, authority was given by the statue 8 Geo. I. ch. 1, to the officer employed by his Majesty to construct the said work, to enter upon any lands along the route of the intended canal, and set out and ascertain such parts thereof as he should think necessary for "making, effecting, preserving, improving, "completing and using in the said navigation." And by the 2nd clause of the act, "after any lands shall be set out and ascertained to be "necessary for these purposes, the officer in charge was empowered to "contract with the owners of such lands, for the absolute surrender to "his Majesty of so much of the said land as shall be required, or for the "damages which he may reasonably claim in consequence of the canal "&c., being constructed upon his premises."

And by the 3rd clause it is provided, that "such parts and portions" of land or lands covered with water, as may be so ascertained and "set out by the officer so employed, as necessary to be occupied for the "purpose of the canal, shall be for ever vested in his Majesty and his "successors."

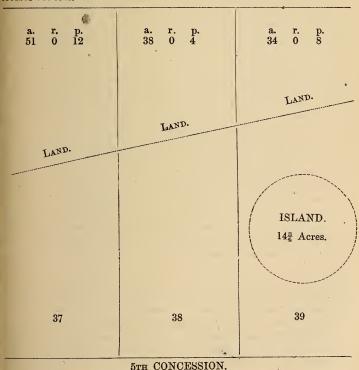
By the 15th clause of the act, it is made lawful for the owner of any lands adjoining to the canal to use any boats thereon for the purpose of husbandry, and to carry cattle, &c., from one part of their farm to another without paying any rate.

The 16th clause gives power to the officer in charge, in case of any breach in the canal, to enter upon lands adjoining, and take materials to repair the damages, for which he is to make compensation within a certain time.

On the 12th January, 1837, before which period the Rideau Cana had been completed, and was in use, the late Thomas Markland, Esq. being owner in fee of the lots 37, 38 and 39, described in his patent as containing 600 acres, executed a deed under his seal in the following terms: "Know all men by these presents, that I Thomas Markland, o "&c., in consideration of 636l. 5s. 0d. to me in hand paid on behalf o "his Majesty, at or before the sealing and delivery of these presents "the receipt whereof, and that the same is in full compensation and satisfaction for all damages by me sustained from the over-flowing of

"the waters of the Rideau Canal upon my lands and premises, situated "within the said district, is hereby acknowledged, have surrendered and "yielded up, and by these presents do surrender and yield up to his "said Majesty, &c., all that parcel and tract of land over-flowed and "covered with water, situate in the township of Kingston, in the district "aforesaid, and being composed of part of lots 37, 38, and 39, in the "first concession of the said township of Kingston, containing by ad-"measurement 462 acres more or less, more particularly described in the "plan thereof hereunto attached; and all my estate and interest in the "same, to the end, intent, and purpose that the said land and premises "(covered with water) hereby surrendered, shall and may from hence-"forth and for ever hereafter, be vested in and held, and enjoyed by his "said Majesty, his heirs and successors, in right of the crown, free from " all incumbrances whatsoever."

Annexed to this deed is a plan exhibiting the three lots, which, lying side by side, form a regular parallelogram, and across the whole breadth of the tract composing the three is drawn a waving line, much nearer to the rear, than the front, and coming furthest down south towards the western side of the tract, and gradually inclining to the north as it crosses the lots.



	SCALE OF CHAINS.														
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Across the diagram, on the north side of this waving line, is written in each lot "land," with figures on each lot stating the area or contents of the portion of each lot north of that line, being on lot 37, 51 acres 0 roods, 12 perches; on lot 38, 38a. 0r. 4p.; and on lot 39, 39a. 0r. 8p.

All south of that waving line is evidently intended to represent water, or rather land covered with water, as distinguished from land, on the north side of the line, though nothing to that effect is written on that part of the diagram; but there is laid down on it a small island as containing 14 acres, 3 roods, which makes it clear that all the surrounding space, till we come to the portion on which land is written, was intended to represent water.

At the foot of this plan is written this certificate, "I do hereby certify "that the diagram is drawn from actual survey, and in actual accordance" with the deed held by the proprietor; that there are 462 acres and "16 roods, permanently covered by the waters of the Rideau Canal." This is signed by William Burke, sworn deputy surveyor for Upper Canada, and is stated on the face of it to be a true copy of the original diagram in the office of ordnance at Bytown.

No distances are marked on the plan; nothing to denote the length of any of the side lines of the two lots, nor the distances from the water line to either end of the lots; but in the corner of the diagram there is given, as is usual, a scale of chains, from which it can of course be ascertained, by measurement, supposing the plan to be laid down throughout on an accurate scale, at what point on the side lines the water line is made to intersect them respectively.

The Rideau Canal is not an artificial channel, but follows a natural chain of waters, extending from Kingston to the river Ottawa, made navigable by a succession of dams, by which the waters are raised at points where it is shallow and rapid, the boats descending by locks from one level to another. In some places along the line, from the make of the country, the dams occasion a good deal of the land to be flooded; and this is particularly the case in the township of Kingston, where the lots in question are situated. There are no towing-paths along the canal, horses not being employed upon it, but barges being used which are towed by steamers; so that in general the government have only had to acquire and pay for the land which is actually covered by the canal. At particular points (as at Bytown) more or less land has been taken in addition, being necessary for various purposes connected with the canal. The statute provides for this, and we have had occasion to learn that the fact is as I state it.

There was nothing in the evidence in this case to lead to the supposition, that, in this instance, the government desired or intended to acquire anything more than was necessary to protect them against claims to damages, on account of their flooding the plaintiff 's land.

The survey was made in the winter, while the waters of the canal were frozen. This gave the surveyor great facility for chaining the land accurately; but perhaps it may have made it less easy than in summer to distinguish the land covered with water from the dry land, as all was probably covered with snow; and the timber on the drowned land was much different in appearance at that season from that growing on the dry land. However this may have been, the surveyor seems to have

made a grossly incorrect survey; for instead of the land being covered with water, to the extent of 462 acres on the three lots, there are in truth not more than 320 acres covered. The surveyor, Mr. Burke, admitted that he did not chain back from the water to the rear of the lots, in order to ascertain what number of acres would be left; but that calculating the parts flooded at 462 acres (and adding, as I suppose, the 14 acres and 3 roods, composing the island referred to), and assuming the three lots to contain 600 acres, he calculated the residue, or the hard land in reac of his water line, at 123 acres, and a little more. It turns out now, and is undisputed, that upon an accurate survey, made when the dry land is clearly distinguishable from the canal, there are not less than 141 acres of dry land more than the 123, which Mr. Burke estimated to be the residue, after deducting 462 acres which he made to be the quantity of drowned land. What I mean is, that after cutting off, from the rear of the three lots, 123 acres, which Mr. Burke merely supposed would be left (for he did not measure it), there are still 141 acres of the three lots not covered or affected by the waters of the canal.

Mr. Markland afterwards contracted to sell to one Patrick McIlroy, all the land in the three lots which he supposed he owned, after giving his deed to the government, describing the land thus: "All those cer"tain parcels or tracts of land situate in the township of Kingston, in
"the district and province aforesaid, and being the rear parts of lots
"Nos. 37, 38 and 39, as laid down on a certain plan drawn by Mr. Burke
"the Surveyor, in the fifth concession of the said township of Kingston, and
"by the said Mr. Burke stated to contain 123 acres, and one half acre," and
in December, 1837, he gave a bond to McIlroy that he would convey the
land so described to him on his making certain payments. In May, 1842,
McIlroy assigned this bond to one Sharp.

Mr. Markland afterwards died, and his son and heir, Mr.George Markland, having become aware of the incorrectness of Burke's survey, and assuming that all the land not covered with the water of the canal still belonged to him, notwithstanding the great discrepancy in regard to the number of acres, he contracted to sell the surplus to one Henderson, as if the contract held by McIlroy entitled him only to expect a conveyance for 123 acres of the rear of the lots, assumed, though erroneously, to be the whole quantity not surrendered to the government.

Sharp objected to the transfer to Henderson of the 141 acres of surplus land, between the 123 acres and the water; and having paid to Mr. George Markland the whole money due upon his agreemant with his father, he demanded a deed of all which was not covered with water; in other words, of all which lies back of the actual water-line; and in order to compel a conveyance to him as extensive as he claimed, he filed a bill in Chancery against Mr. George Markland and Henderson. Mr. George Markland, either apprehending that he could not resist the claim, considering the terms of the description in the bond which Sharp held, or not choosing to enter into an expensive contest about it, compromised with Henderson; and he and Henderson joined in a conveyance to Sharp, on the 3rd of July, 1843, assuring to him "all those "certain parcels or tracts of land, situate in the township of Kingston, "&c., and being the rear parts of lots Nos. 37, 38, and 39, as laid

"down on a certain plan drawn by Mr. Burke, the surveyor, in the fifth "concession of the said township of Kingston, and by the said Mr. "Burke stated to contain 123½ acres;" thus following the very words of the description in the bond given by the late Thomas Markland, Esq., to McIlroy.

On the 7th of June, 1845, Sharp executed a mortgage to the lessor of the plaintiff, Gildersleeve, adopting verbatim the description given in the deed made to himself; and it seems that afterwards (in 1846), the sheriff having several writs of fi. fa. against the lands of Sharp, exposed his interest in these same premises to sale, and it was bid off to the lessor of the plaintiff, to whom the sheriff afterwards executed a deed. This is immaterial, as Sharp's equity of redemption could not be sold upon a fi. fa., and the lessor of the plaintiff must stand or fall upon his title under the mortgage.

I considered, at the trial, that upon these facts the legal title to the 141 acres in dispute, or rather to the whole land back of the actual line of water, was in the lessor of the plaintiff as mortgagee of Sharp; though the defendant, of whose interest in the lands no evidence was given at the trial, contended that all belonged to the government, except the 123½ acres, which Mr. Burke assumed to be residue after taking out the land covered with water, and for which latter part they did not defend.

The jury took the same view of the case which the defendant did, and gave a verdict for him; which the plaintiff has moved to set aside, as being contrary to law and evidence and the judge's charge.

As it is for the plaintiff to make out a title to the premises which he seeks to recover, the question, as was remarked on the argument, is rather what land is covered by the deed to Sharp, then what land is covered by the surrender to the crown; because it is through Sharp's conveyance the plaintiff claims; and unless that embraces the land in question, or some part of it, the plaintiff cannot recover, and it would be of no consequence as regards his right, whether the crown should be limited to the land actually covered with water, or not. That is very clear; but at the same time it is clear that the distinction is of no moment; for taking it either away, we have the same question to determine—we shall be only approaching the same point by another road. The deed to the crown and the deed to Sharp are both grounded on the same diagram, to which they both expressly refer; and when Mr. Markland, in a deed to which that diagram is annexed, surrenders to the crown all the land covered with water, being parts of lots 37, 38, and 39, containing 462 acres, more or less, and more particularly described in the plan; and when he, or which is the same thing, his heir, afterwards, with the same deed of surrender and diagram annexed to it in his hands, makes a deed to Sharp of the rear parts of the same lots, as laid down on Mr. Burke's plan, and by him stated to contain 1231 acres, it is clear that he means to convey to Sharp, all that remained to him after his surrender to the crown. In order, therefore, to know what was left, it is necessary to find in the first place what he had parted with. It is impossible to ascertain the contents of the second grant, without first determining the contents of the first; and as soon as we have ascertained the one, then we have ascertained both. The three lots

front towards the south; it was the southern or front portion of them that was overflowed by the canal; and when Mr. Markland, in his deed to Sharp, speaks of the rear part of the same lots as laid down in Mr. Burke's plan, he can only mean that land which is behind the boundary between him and the government: the "rear parts" either means that, or it means nothing; and it is clear the deed means that, because it tells us, that the land spoken of is that which Mr. Burke had estimated at 123½ acres, and the plan shews us that it was the land north of the dividing line between Mr. Markland and the government, which Burke had estimated at that quantity.

The question, therefore, to be determined at the trial, and it was so treated by both parties, was where that boundary should be taken to be; but though the case called for a decision upon that point, in order to determine to what extent the defendant was a trespasser, and to settle the contest finally and satisfactorily, it did not seem to me, (and I so stated to the jury) that there could be any doubt, as to the plaintiff being entitled to their verdict in respect to some portion of the land, of which the defendant admitted himself to be in possession. By the consent rule, the defendant denies the plaintiff's right to any more land than precisely a regular tract of twenty-two claims in depth, measuring from the rear, but he has clearly no right thus to limit him.

Burke did not mark on his plan the length of any of the lots, nor afford any means for reckoning with certainty their contents; he swore on the trial, that he never did in fact chain along the whole lots to ascertain what would be left after deducting the 462 acres, which he conceived to be covered with water. He, therefore, could do no more than guess at the residue; Mr. Markland and Sharp both knew this, and they are therefore careful in the deed made by the one and accepted by the other, to speak of 123½ acres as being the quantity which Burke stated the lots to contain in rear, that is, in rear of the land surrendered to the crown.

In order to support the construction which the defendant (who for all that appears is a stranger to the title, as well as to the whole transaction,) chooses to put on this description in a deed between other parties, he takes on himself to measure along the side line of each lot, from the rear towards the front, 22 chains exactly, which he finds, I suppose, by measurement since made of the breadth of the lots, would, by drawing a line at that point evenly across them, include about 1231 acres, and that he insists upon it was just the land that remained to Mr. Markland after the surrender, and no more: but in doing this he pays no attention either to the boundary of the land covered with water, as seen upon the ground, or to the line as sketched upon Burke's plan; but makes a claim wholly inconsistent with both. No construction could be given to the surrender and plan annexed, which would make the boundary between the government and Mr. Markland such as the defendant contends. The surveys made by Bruce and Burrowes afterwards, shew clearly, what cannot be denied, that between a line drawn straight across the lots at the distance of 22 chains from the rear, and the boundary, even as laid down on Burke's plan, there would be a considerable quantity of land intervening. There is nothing whatever to entitle the government to hold up to within 22 chains of the rear on each side line; they clearly purchased a tract of a different kind; and

whatever they did not purchase from the rear of the lots with reference to Burke's plan, and under that designation was conveyed to Mr. Sharp, and afterwards to the plaintiff, whether it be much or little, and of any such land, the defendant might be wrongfully in possession.

It is quite clear how Mr. Burke proceeded. He satisfied himself bsome extremely erroneous calculation that there were 462 acres of land drowned; he found the island standing above that drowned land to contain 14 acres and 3 roods; he added these together, and then assuming the lots to contain 600 acres without taking the pains to ascertain it (which indeed he had no motive for doing) he deducted the drowned land and the island from the 600 acres, and put down the difference 1231 as the supposed residue, marking it "land," to distinguish it from the tract covered with water, which alone he, and all parties, understood and intended was to be surrendered to the crown. How he came to make such a gross blunder as to estimate the drowned land at 462 acres, when it in fact did not exceed 321 acres, he could not or did not explain at the trial. He planted no posts any where to mark what he found to be the margin of the water; so that there are no means of tracing his survey on 'the ground, and detecting his error. It was explained that the lots all over-ran considerably in width, and that would account for a surplus beyond the 123 acres, even allowing the drowned land to be 462 acres; and of this surplus Mr. Markland was beyond any doubt the owner; he could convey it to Sharp, and his deed would embrace it.

My impression at the time was, that Burke must either have been altogether astray as to the position of the front concession line, which was over-flowed, and so started from a wrong point; or that he must have made a most inaccurate measurement, taking land to be over-flowed which was not overflowed; or that he made some rough scaling on the ice, and sketched a plan from it, which he afterwards carried out and completed partly from memory, making the intersection on the side lines at points that would correspond with his estimate of the quantity of land, and not at points which he had arrived at by actually chaining back from the front of the lots.

There can indeed be no doubt, that he did not fix the limits of the drowned land by measuring back correctly from the front to such limits, and if he had left any visible traces of his survey on the ground, that could have been at once ascertained, but he planted no posts anywhere.

His manifest error is not to be accounted for by supposing that there might have been so much more land covered with water in 1837 than at present. The nature of this artificial work renders that impossible; the dams have been always the same in height, and hold back the water to the same extent now as when they were first constructed. Indeed, the surveyor who was called by the defendant, swore that there was less land drowned when Burke made his survey than at present, because the water was then partly drawn off, as it usually is in the winter. He swore also that the water has never varied a foot in height since the canal was made; that no part of the 141 acres of land in question (that is the surplus between the 123 acres and the real water line) has ever been drowned; that it could not have been, and that the timber shews it was not; Burke's survey he declared was no doubt altogether incorrect.

There was then first, the question whether the plaintiff was not clearly entitled to a verdict to recover at least that space between the line, as it would stand in Burke's plan, applying his scale or measurement, to fix the points of intersection, and the straight line across the lots, cutting off just 123½ acres, as if that were an absolute quantity which alone Mr. Markland were to keep without regard to the water line, either as it existed in fact, or as Mr. Burke laid it down; and upon that question I am still clear that the law is with the plaintiff, and that he was therefore entitled to a verdict.

Upon the other and more material point, whether Mr. Markland's surrender includes anything more than the drowned land, I was of opinion at the trial that it does not. I endeavored at the time to satisfy my mind what effect it was necessary to give to the description in the deed, and though I could not conveniently refer to authorities, I had leisure as the case was pending to compare the papers and documents, and to consider what ought in reason and justice to be their effect. My brothers, I believe, take a different view of the matter from that which I took at the trial, and it is therefore probable that I was wrong, and that I attached too much importance to the fact that the deed only professes to convey land covered with water; I am bound, however, to say that the consideration which I have since given to the subject, and a reference to authorities, have strengthened the conclusion which I came to at the trial; and if my brothers were of the same opinion, I should have no doubt that it was correct.

The government, there is no doubt, desired and intended only to acquire the land covered with water. The statute, the occasion they had for making the purchase at that point where there were no locks or artificial works, the recital in the deed, which says that the object was to extinguish all claims for damages for over-flowing the land, all concur in proving this intention. From 1837 to this time, the government had never, as it appeared, asserted any right to the 141 acres in question, or given any proof that they imagined themselves to be the owners of it; and if contemporaneous construction is a material point to be considered, even in giving effect to acts of parliament, the conduct of the parties is no less material as throwing light upon their own understanding of their contracts.

The evidence that the land is in the same state now as it was at the time of the conveyance, was clearly admissible; for all deeds are to be construed with relation to the subject matter, and if possible so as to effectuate the intention of the parties.

It is said, that the best way to expound a description is to read it on the land; and a late writer remarks, "that evidence that the parties were "in the same situation as to boundaries at the date of the deed, as they "are now, is not (it is apprehended) that sort of prohibited evidence "which cannot be received, because it merely proves that there has not been any alteration in the parcels, and that the construction of the deed should, with reference to the subject matter of it, be the same as it was "on the day it was executed.—Coventry on Conveyancer's Evidence.

It was proved on this trial, and there is no doubt of it, that the land upon these lots covered with the water of the Rideau Canal, was the same when Mr. Markland made his surrender to the government as it is now.

Now, what he did surrender was, "the land over-flowed and covered with water," and the previous part of the deed shewed that the government was acquiring the land in order to extinguish all claims for damages for over-flowing it; and the plain intent of the parties is usually strengthened by the words added at the conclusion of the deed, "to the "intent and purpose that the said lands and premises covered with water "hereby surrendered, shall from henceforth for ever hereafter be vested "in and enjoyed by his Majesty." It is plain from the deed and the plan taken together, that the seller meant to surrender all the land that was over-flowed by the canal, and no more; and that the government meant to acquire all the land that was so covered, and not an acre less. When the intent is so plain, it is not be defeated by the gross blunder of a surveyor, or by any error in the description arising from whatever cause.

Here the mistake happens to have been against the party buying; but suppose it had been the other way, (and the same principle must govern in both cases) then, although it was the plain intent of the government to acquire all the land covered with water, so that they might not afterwards be harrassed with actions for dameges, yet if the surveyor had made the same unaccountable blunder on the other side, and drawn a plan which shewed 141 acres less than there really was of land covered with water, then although the surrender and the plan make it plain that all the land so covered was intended to be surrendered, the government would be still left exposed to claims for damages.

In a common case between individuals, if one were to contract with another for a mill site on his property, and an area of so many acres round it, and the conveyance, after specifying the object of the grant, were to refer to a plan of survey in which its true position happened to be erroneously set down, that error would never defeat the intention of the parties; the description being read on the ground, would make its meaning clear, and such meaning must have effect.

It is true, that in this case the dry land, which it was not intended to pass, appears to have been land of an ordinary average value, which Mr. Markland would probably have had no objection to have parted with at the same average price, to the very rear end of his lot; for indeed he did soon afterwards sell to McIlroy what he took to be the remainder of it, at about the same rate; but that is no intrinsic circumstance by which the operative effect of the deed cannot be affected one way or the other. That must be taken to be such as it was when it was executed; the legal question being, whether the deed, as it is expressed, did or did not pass more than the land overflowed by the canal. In many cases, along other parts of the canal, such a blunder of the surveyor might have a ruinous effect on the proprietor, and sweep away all the valuable part of his farm; a mistake of a chain or two, or of a few acres, might make the description take in a valuable mill, or a man's house and garden; and in this case, if instead of the whole lot being unimproved land, and Mr. Markland being an absent proprietor residing in Kingston, and as willing, probably, to part with one part of this land as another, he had happened to be a farmer who had lived many years on the land, having all his fields and improvements on the very 141 acres which the surveyor in his plan falsely represents to be covered with water,

it would have appeared to every one to be monstrous that such an effect could be given to the deed and plan before us, as to deprive him of his farm, and of his means of living, and all at the price which he had agreed to take for his drowned land, when the very clearing and fencing of the land, which it would be evident on the very face of his deed he never meant to part with, must have cost him three or four pounds per acre.

We cannot tell in how many cases along this same canal a mistake in a survey or description of a single chain or less, in describing the boundary of the drowned land, might on the one hand wholly defeat the object of the government in acquiring the land, or on the other, prove ruinous to the proprietor. Mistakes, no doubt, are often beyond the reach of remedy in courts of law, and possibly sometimes also in courts of equity, but never where the intent of the contracting parties is plain, as it is here on the face of their deed.

It is true, that the government has in consequence of this blunder of a surveyor, been made to pay for 462 acres, when in fact they should only have paid for about 320; but no argument of any weight can be derived from that, in opposition to the legal effect of the deed. That may happen in any such case, and does happen in all, where the land has been sold at a price per acre; but there may be no proposition between the excess or falling short of the sum of money in any such case in consequence of the error, and the real value of the tract that would be improperly included or excluded, if effect were given to that error contrary to the declared intention of the deed; and that alone would shew that the principle of construction can never be made to depend upon that circumstance.

Abundance of such cases are to be found in the books; they most frequently arise in equity or bills for specific performance, where one of the parties, upon the error being discovered, refuses to carry the agreement into effect. There the court are often obliged to consider what extent can in reason be allowed to the words "more or less" in the particular case; whether the one can be obliged to accept an estate, though it falls much short in quantity, or the other to convey it though it much exceeds the supposed quantity, when the parties have been influenced by an errononeous idea of the contents. In some such cases, according to the circumstances, the court have thought it just to refuse a decree unless on the principle of compensation for the error; in others they have said, it was the fault of the party if he was paid too much, or accepted too little; that the tract intended to be sold was plainly expressed, and it was his own negligence if he did not take measures to ascertain the precise contents, in which case they will compel him to carry his agreement into offect without abatement or allowance.—10 Ves. In. 505; 4 Russell 268; 1 Ves. & B. 375; Sugden, vol. 1.

Wherever fraud appears, of course there a court of equity will take its measures accordingly, to prevent any party acquiring an advantage by his own wrong. Here nothing of the kind was imputed to Markland; on the contrary it was studiously disclaimed. Burke seemed, it is true, to have been employed by him, but only under these circumstances (which probably was the common course); he was seeking compensation under the statute for his land over-flowed; the Ordnance officer said, "have the quantity ascertained by a surveyor, and we will

"pay for it." Mr. Burke, a sworn provincial surveyor, is in consequence sent for, and makes the survey, which is returned to the government, accepted and adopted by them as a public authentic document, and acted upon by them and Mr. Markland equally in good faith; both being equally ignorant of any error, and neither having had any influence in producing that error. Under such circumstances the surveyor is to be looked upon as the agent of both parties. If the government chose, they could have employed one of their own selection, but having waived that right and confided in the public licensed surveyor employed by the other party, they adopt him as their own agent, as much as he was Mr. Marklands. If he had drawn his line some chains too short, and had left them in the water, they would have a right, under the deed, to claim, nevertheless, a right to all the land covered with water; and the same principle of construction on the other hand, confines them to the water; they can go to the dry land, but cannot go beyond it.

It may be said that it would be monstrous that Mr. Markland, having been paid for 462 acres, should only be held to have ceded 320 acres, and yet should keep the price paid for the larger quantity. That raises a question of right or wrong relating to the refunding of money only, and which cannot have any effect in determining what the conveyance actually covers. It is a consideration that can arise consequently only, after the legal question has been settled.

It has not been shewn that the government has ever called upon Mr. Markland to refund the overplus, and that he has declined; and if the effect of the sound legal construction of his deed should be to leave him or his assigns in possession of that land, then all that can be said about it is, that the government can reclaim the excess of purchase-money paid in error, if they have a right under the circumstances; and if they have not a right to reclaim it, either in the view of law or equity, then we are bound to consider that there is no wrong done in its being withheld.

It is really therefore immaterial to remark, when all idea of fraud in making the contract is denied, upon what may have been Mr. Markland's expectations or intentions, in regard to retaining both the land and the money; but he seems to have proceeded as any fair person might be expected to do.

The late Mr. Markland supposed his three lots to contain 600 acres, and that there were really 462 acres drowned, for which he received 30s. per acre. It was proved that he afterwards was told, that the survey was inaccurate, and that there was much more of dry land remaining than Burke had marked on the plan. His remark was natural and honourable; he said he had received his patent for 600 acres, and was willing to take up with what was stated to be left—that is, the 123 acres.

Whether this was said before or after he had consented to sell to McIlroy what is called the rear of the lots, was not explained; nor indeed, whether he knew of the surplus before he did give his bond to McIlroy. It may have been, that he was told of it only after he had given the bond, and that he sold the rear of the lots for a sum estimated on the supposed contents of 123 acres, and that upon learning that McIlroy claimed in fact 265 acres, he may have said, that having been

paid in all for 600, he was content. But the government, for all that appears, had never interfered with an acre of the dry land, or imagined that they had a claim; so that Mr. Markland's liberality may have meant nothing more than that he was satisfied, and that the government might either claim the excess or not, as they thought right; and that McIlroy might, as against them, set up any claim or not to the excess under the conveyance of "the rear parts," which he was to make to him. When Mr. Markland died, his heir had an accurate survey made of the land, and then the exact and great amount of the error was ascertained; and it seems to have occurred to Mr. George Markland, that it was absurd that McIlroy should claim and occupy 264 acres, when he had only supposed he was buying 123, and had paid for no more; and he therefore took upon himself to sell the ascertained excess, or the 141 acres, to Henderson. If that sale had gone into effect, and Henderson had paid him his price for it, it ought in justice to have followed that Mr. George Markland should have returned to the government a proportionable part of the purchase-money which his father had received, and this whether they had any notice of the matter, and had thought proper to claim it or not; but most certainly if they claimed it, for otherwise the same land would have been paid for by both parties. We are not justified in saying, that he would have refused or hesitated to do so. If he had, why could he not have been compelled to repay it, as money paid without consideration? He must have been liable to refund, unless the principle caveat emptor entitled him to retain the money, in which case we should have no right to impute injustice to him. But it turned out, that McIlroy having assigned his interest to Sharp, and Sharp advancing, as McIlroy had done before him, a right to hold all the dry land, or in other words all "the rear parts of the lots," under the terms of the contract, a suit in Chancery followed; and then Mr. Markland, being advised perhaps that the terms of his father's bond to McIlroy would convey it, whether it should be much or little, compromised with Henderson, and gave afterwards a deed to Sharp, so extensive in its terms that it would convey all that his father had it in his power to sell; thereby falling back to the ground that his father had been content to abide by.

Under these circumstances, it is plain that Mr. Markland is enjoying no undue advantage. It is reduced to a litigation between Sharp and this defendant (who for all that appears may be a mere wrongful occupant), upon the extent of his deed. If having clearly a right to all the rear parts of the lots according to his deed, and such rear parts appearing by the plan referred to in that deed to mean as clearly all north of the land surrendered to the crown, he can in consequence hold the 141 acres in question, then it will be evident that the government have paid for so much more land than they received, though Mr. Markland's estate will not have profited at all by the excess. What legal claims, if any, could result to the government against Mr. Markland's estate, and in consequence against Sharp, is not a matter that can in my judgment be in the least degree material in this action.

As to the legal principle by which this case should be decided, I take it to be clear. It is fully stated, in as good an authority as could be cited on such a point, Sheppard's Touchstone, 246 to 251, with the

advantage of illustration by the learned editor, Mr. Preston, the most experienced conveyancer of his day. I refer also to Bac. Abr., Grant H. Comyn's Digest Fait. E. 4; Rex. v. Bishop of Rochester, 2 Mod. 3; Swift v. Lessees of Peto, Cro. Car. 548; Wrottesley v. Adams, Plowden 191; Hob. Rep. 154, 171, 176, 216, 275, 276, 303, 804.

We have in this lease the certainty of the thing intended to pass, which is sufficient; with a false demonstration which can in such case do no hurt—Shep. T. 247. As the court say in the case I have cited from Plowden, "There is a certainty in the thing demised (viz: all the land covered "with water) and so another certainty put to a thing which was certain "enough before, is of no manner of effect." As in this case, the reference to a plan meant to be correct, but wholly incorrect.

The material, substantive, essential part of the grant is, "the land co"vered with water;" the latter part by reference to the plan is cumulative
and meant only to explain it; it is the demonstration only that is false.

As if one grant "all my meadow to D. containing ten acres, whereas "in truth his meadow there doth contain twenty acres, it is a good grant "for the whole, for the meadow is the substantial part."—Dyer, 80; Shep, T. 248. "If a grant be of an acre of land covered with water "this is a good grant;" so it is equally good where the grant is of the land on a certain lot covered with water, "id certum est quod certum "reddi potest."

In the case of the meadow, Dyer 80, the variance was so great as to double the quantity, and therefore greater in degree than in the case before us; but yet all passed, because the worthier part of the description was that which was announced, at the commencement, namely, " all my meadow," and the false demonstration is subordinate to it, and cannot over-rule it. So if the error had been the other way, and the meadow had contained only five acres instead of ten, the grantee would have taken no more than the meadow; the reason is, because the worthier and more essential feature of the description is that which shall prevail, namely, the grantor had sold "all his meadow;" whether it contained ten acres or twenty was the minor and less important fact. This principle is discussed in many books; in Com. Dig. Fait. E. 4, it is stated, and illustrations given there, and in a note to the section. "Veritas nominis tollit errorem demonstrationis," is the maxim; and the application of it is thus explained, "therefore if lands are described in "the first instance by their proper names, as the Manor of Dale, or by "their abuttals, as a close of pasturage, bounded on the east by, &c., on "the south by, &c.; or if the general boundary is mentioned, and the "grantor has no other lands in the same precinct; or if the lands are "described by their appendancy to other lands more notorious, as par-"cel of the manor of A., &c.; in all these cases if there be an error in "any addition made to any of these names or descriptions, it will have " no effect."

To apply this to the present case: In the deed of surrender, Mr. Markland professes to give up to the crown; "all that parcel of land "cverflowed and covered with water, being composed of parts of lots 37, "&c., containing by admeasurement 462 acres, more or less, and more "particularly described in the plan thereof herunto annexed." The lands intended to be given up here, in the first place, described by a

general designation, which is certain enough, "all that parcel of land "over-flowed and covered with water, being parts of such and such lots," and containing by admesurement, 462 acres, more or less. This addition of "more or less," shews that the 462 acres was only a supposed quantity, not an absolute inflexible one, the evident intention being, that if there should be more such land covered with water, the crown should have it all; and if less, then upon the same principle, only as much as there actually was. It is in effect the same as the case in Dyer, 80: "all my meadow in D., containing ten acres" (when in fact it contained twenty,) except that in that case the quantity was mentioned as a certain quantity, and with no latitude of more or less, as the quantity stated in this case. The court says there, "the meadow is "the substantial part of the grant;" so here, the land over-flowed by water is the substantial part of the grant, and if the deed itself were not clear on this point, and could leave a doubt on our minds as to the object of the surrender, that doubt must be removed on an inspection of the plan annexed, and referred to in it, for there the quantity intended to be granted, be it 462 acres, more or less, is exhibited as being all drowned land, and the surveyor certifies that it is so.—Shep. Touch. 248; 14 E. R. 574. It is monstrous to say, that if Mr. Markland had had a house on the rear of his lot, standing on a cliff one hundred feet high, the surveyor could bring it within this grant of drowned land, by falsely representing it to be covered by water. This would be plainly disregarding the acknowledged maxim, "Falsa demonstratio non 'nocet, nil facit error nominis quam de re constat." All that was meant o be surrendered was, land covered with water, and setting out with hat as a certain designation, the cumulative description which follows nust be rejected when it fails in point of accuracy, as it does here gregiously.

If the surveyor in this instance had planted stakes in the ground, which he swears he did not do, and if the deed of surrender had set out y granting all the land from the front of the lots up to those stakes, hen there would have been the certain designation of what was intened to pass; and if the deed had added afterwards as mere matter of escription, "which said land is covered with water," when in fact it was ot, or only in part, then there would have been ground for contending at the latter was mere cumulative description, and being inaccurate ust be rejected. But here the terms of the description are reversed; essential part of the description is, "such portions of the lots as are covered with water;" and that being announced, the deed goes on with e words "and more particularly described," which is mere matter of mulative description that turns out to be most inaccurate and repugnant the deed.

The case of Stukely v. Butler, Hob. 168, contains all that is necestry for placing this description in its true point of view. If it can be id of the words of a description, that the sentence or part of a senter is incomplete as to its meaning, so as that it defines nothing cern, but the sense is suspended as it were, until something is expressed which the meaning is evidently made to depend, then of course the coluding words must have effect and cannot be rejected, though they yeven have the effect by their repugnancy to what goes before, to make

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void the whole grant; but where there is first a complete sense, as there is here, taking the first part of the description and the plan together, which shew that no land was to be withheld which was covered with water, then, whether that designation be expressed in a whole sentence, or only in a member of a sentence, what follows after in the same or another sentence, which is not necessary to complete the sense, but is merely intended to shew what the latter terms, when they come to be applied, will lead to, there such additional description cannot be allowed to destroy, restrict, or enlarge what is certainly set down before. Thus, for instance, if a man by his will should devise his estate to be divided among such three of his sons as shall be thereinafter named, having more than three, and should name none, or should name only two, or name five, there his devise must fail, because the sense is suspended and incomplete, depending on something not yet expressed with sufficient certainty; but if he should devise the land to be equally divided among all his sons, then the sense would be complete and his meaning plain, and although he should afterwards profess to name them, and make a mistake in naming them, such talse description would do no harm.

Lord Hobart, in the case I have just cited (172) gives this illustration of the principle, "as if I have in D. black acre, white acre, and greer acre; and I grant unto you, all my lands in D., that is to say black and "white acre;" yet green acre shall pass too, and why is that, but because the grantor had commenced by granting all his lands in D., and the reswas mere additional matter of description, an error which could do no harm, and he adds, "but if I add under the, viz.: land lying out of the "town of D., it shall not pass;" and why is that, but because the granto had commenced by stating that it was only land in D. that he intended to grant? So here, Mr. Markland having commenced by granting only the land over-flowed, a reference to a plan which is meant to describe that can never have the effect of drawing dry land within the grant, for the distinction is as definite as between one parish and another, or between meadow and wood.

If Mr. Markland had made a surrender to the crown of those portion of the lots which lay in front of a certain stream of water crossing the sai lots, or, "all the land from the front of the lots up to a certain travelle "highway crossing the same," and had added "and more particular "described in the plan thereof herennto annexed," it cannot surely t maintained, that if the plan should represent the distance inaccurately, s as to include what according to the scale would be beyond the stream, the highway, the owner would by such error be deprived of that portic contrary to his manifest intent; the very plan would carry its infirmi and its incompetency as a guide on the face of it, for it would be repugnar in itself, as it is in the case before us; it would represent the object which was intended to be the boundary as in fact bounding the grant, but would shew it to be delineated falsely. Then surely when truth and fals hood come in opposition, it is not the false part of the statement which alone is to be attended to and the other discarded; it is the false demo stration which must give way.

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The very plan here, though it is false in one respect, as it shews racres to be covered with water, which are perfectly dry, is true in the other respect, that it describes the whole contents of the land intend

to be surrendered as being covered with water, and places a boundary separating what he calls the 462 acres of water, from that which he calls by way of distinction "land;" thereby announcing as plainly as it can, that the boundary between the crown and Mr. Markland is to be that line which divides the water from the land, be it where it may, and let it enclose what it may. And in short, there is one word in the description which of itself ought to leave us in no doubt as to any effect which the plan can have; for the grantor after surrendering in terms the parts of the lots covered with water, and no part else, adds, "and more particularly "described in the plan thereof," which word "thereof" can, on the plainest rule of construction, refer to nothing but "the parcel or tract of land "overflowed and covered with water." It is only of land so over flowed that the plan professes to give any description; as to all beyond that, it claims no credence for it does not profess to describe it. And it need hardly be said that a surveyor can no more convert dry land into water by representing it falsely on a plan, that he can make land in one parish part of another parish by erroneously calling it such.

The surveyor, Mr. Burrowes, who was examined as a witness for the defendant, on the trial, swore that instead of their being more than two-thirds of the land covered with water, as Burke's plan represented, there was only about one-half. If therefore, Burke, instead of making the survey which led both parties into the error, had drawn a line across the lots dividing them into two equal parts, marking the one as land, and the other as water, he would have been much nearer the truth; but if he had committed the absurd blunder of marking the north halves as being covered with water, and the south halves as dry land, then according to what the defendant's counsel contended for, the dry land must have gone to the crown, and the part covered with water, including the canal, must have remained to Mr. Markland, notwithstanding the evident intention of the deed.

But sooner than that should take place, the deed in my opinion would be held void, and the vendor, as in other such cases where a deed wholly fails of effect according to the intention of the parties, would be forced to refund the money. Where two parts of a description are both necessary to be attended to, in order to furnish a complete statement, so that without either there would be nothing definite, then where one part is wholly irreconcilable with the other, the deed must fall to the ground. That could not in my opinion be the case here, for the deed, independently of the plan, shews in the first place that it was only land covered with the water of the Rideau Canal that was to pass by the deed, and that the quantity was yet undetermined; then the plan, which is expressly referred to for more particular information, shews further that it was intended by the parties that all the land on the lots which was so covered or overflowed. should be surrendered. That is evident on the face of the plan. 1st, from the line of boundary being plainly drawn as a dividing mark between "land" and water, "land," "land," "land" being written on the north side of it across the whole breadth of the lots, and on the other side a blank colourless space, not marked as "land," but exhibiting in the midst 'of it an island of which the contents are given. 2ndly. From the formal certificate on the face of the plan which professes to give the quantity, i,e. ill the quantity of land ascertained to be overflowed. So that the deed

and plan together express as plainly as if those very words were in the surrender alone, that Mr. Markland was surrendering to the crown "all those parts of lots, &c. &c., which are overflowed with the waters of the Rideau Canal," and that being clear without reference to any thing out of the deed, (of which, for the purpose of description, the plan forms a part) -14 E. R. 574; it is the same as if the deed (without any plan) had granted "all the parts or portions of Lots 37, 38, and 39, which are over-"flowed by the waters of the Rideau Canal;" and then had added "which "may be more particularly described as follows," that is to say-beginning at the south east angle of Lot 39, then northerly 83 chains, and so on; whereas in fact the 83 chains would greatly overrun the land overflowed, and would enclose a great deal of dry land that never had been covered with water, and which it was clearly not intended to grant. In that case we should have had in the deed so worded, "a general certainty of the thing to be granted" in the first place, namely, all the parts of the lots covered with water, followed by "another certainty put to a thing which was certain enough before," as in Wrottesley v. Adams, Plowden 191, where a man granted his farm in Brosley, which was sufficiently certain, and then added "in the tenure and occupation of Roger Wilson," which was untrue; but the court held the latter cumulative description to be of no effect; that it was a false description which could do no harm; for it was a certainty added to a thing that was certain without it.

I hold the two cases to be undistinguishable, and that dry land shall not pass under a conveyance of land covered by the waters of the Rideau Canal, contrary to the intent of the parties manifested by the deed, an intent made certain on the face of it: and where all that can be said is, that it is opposed by the terms of a false description which professes only to describe the land so over-flowed.

Of many lots of land in this province there are portions covered only with pine timber, which are perfectly distinct from other parts in the quality of the soil as well as in the description of timber, and it is often much more valuable, or much less, according to circumstances of situation. &c. On other lands there are sugar bushes, which have also their peculiar value, Now if the proprietor of any such lot were to sell the pinery upon his lot, or the sugar bush, containing so many acres, more or less, and being more particularly described in a plan annexed, the surveyor entrusted to make that plan might, by a blunder, not more unaccountable than was made in this case, frame his plan so unskiifully of that which was certainly enough described before, as to delineate the pinery on that part of the land which contained nothing but hard wood, and not a pine tree; or might describe the sugar bush as occupying a position, which was in truth a ploughed field, containing not a tree of any kind; but if he should do so, the error would not have the effect of so confounding and perverting the declared intention of the parties as to make the one party sell what he never meant to part with, and the other to buy what he had no wish to acquire. To hold this would be to set at nought what meets us at every turn when investigating such subjects, namely: that "grants are to be construed according to the intention of "the parties, and that therefore if a thing be granted generally, and there "come a viz. (or in other words a cumulative description,) which de-

"stroys the grant, it is void, (or as I understand it, is to be rejected) being "repugnant to the thing first granted."-Bac. Abr. Grants 1. The language of Littledale, I., in the case of Scratton v. Brown, 4 B. & C. 505, is strongly in point as to the above principle. It was said by Stamford J., in Throckmorton v. Tracy, I Plow. 161, "the intent directs "gifts more than the words." "As if an annuity be granted pro con "silio impendendo, and the grantee has divers faculties, yet the counsel "shall be given in such faculty as was intended. And so if a receiver "is bound to his master to pay him omnia recepta et recipienda in his office, "he is not thereby bound to pay all that he might receive, but only ' what he shall receive in fact, so that the intent shall be pursued rather "than the words; for to pursue the words is summum jus, which judges "ought to avoid, and rather pursue the intent." "A mistake, or error" (it is laid down in Bac. Ab. Title Grant) "shall not render the true "design of the contract neffectual and void." There can be no doubt of the intention of both parties to this surrender; and I deduce from the principle I have stated, that if the effect of the measurement in the false plan standing alone, would be to come short of relinquishing to the crown all the land covered with water, yet under the words of the grant, and upon the general aspect of the plan, exhibiting, as it evidently means to do, all the land covered with water, and looking at the formal certificate at the foot of it, which professes to tell us how much is so covered in my judgment, the crown would take all the land over-flowed. because that was the evident design of the surrender; and, if so, then the principle must be applied both ways, and in error in the plan in regard to distances shall as little carry all the grantor's buildings and fields away from him, under the description of drowned land, when the intent of the parties was so clearly otherwise, both on the face of the deed, and of the plan to which it refers. Ejectment will lie for so many acres of land aqua co-operta (Yel. 143.) but I apprehend that neither in a declaration in ejectment, nor in a pracipe quod reddat, would it be held that under that name any description of land whatever, could be recover-

It is said by Lord Coke, r Ins. 4 (b); "If a man hath a wood of elder "trees containing twenty acres, and granteth to another twenty acres "alneti, the wood of elders and the soil thereof shall pass; but no other 'kind of wood shall pass by that name."

So in another passage, Co. Lit. 5 (a), it is said, "Marettum properly "signifieth moorish and gravelly ground, which the sea doth cover and "over-flow at a full sea. By grant of these particular kinds, the land of "those particular kinds only doth pass; but by the grant of land in general, "all these particular kinds, and some others pass."

Either the law must have been wholly changed since that day, or by a grant of land covered with water, such land will not pass as is in no degree covered with water, as arable fields, or mountains.

If this had been a deed by which one individual granted to another "all his cleared and inclosed land on lot, &c., containing so many acres, "more or less, and more particularly described in the plan annexed," I take it to be clear that wood land, which was neither cleared nor enclosed, could not pass by the deed; and I look upon it, that the utmost that can be said is, that the plan, though erroneous, might have the

effect (according to the influence given to it by the reference in the deed) to occasion more of the land covered with water to pass, than the parties might appear by the deed to have intended, but that it could not avail to pass other kinds of land not of the description of that declared to be granted, and more especially where the plan is referred to only as describing land covered with water.

Perhaps it may not be allowed to us to understand the deed alone as saying "all the land covered with water upon lots 37, &c., containing 462 "acres, more or less, and more particularly described in a certain plan "hereto attached"; in which case the reference to the plan could not possibly be regarded as more than a merely cumulative description, incapable of restraining the deed.

But if we take it literally as it stands; it is a surrender of "all those "parcels of land covered with water, situate on lots 37, &c., containing 462 "acres, more or less, and more particularly described in a certain plan "hereto attached," &c. &c., and the clear effect can only be this; that the party surrenders those parcels of land eovered with water (and no other lands), being parts of lots 37, &c., and containing 462 acres, more or less, which are described—that is, laid down—in the plan annexed; in other words, such portions of the three lots covered with water as are described on the plan; and the question is (which it seems to me, is no question), whether the plan which professes to be in unison with the deed, and to describe only land covered with water, can have the effect of making dry land pass under the deed, by erroneously throwing the dry land out of its proper position, and falsely delineating water in its place. To give it that effect, would be to act in direct opposition to the authorities which I have cited, and would be doing what could be supported by none that I have been able to find. And it would be equally opposed, as it seems to me, to the closest grammatical construction of the deed, which only grants such land covered with water, as is particularly described in the plan, and not such dry land as the plan may falsely describe as being covered with water.

The error does no more than introduce an instance of which there have been many, in which all parts of the grant cannot literally stand together; which is always the case when there is first a plain and certain designation, and then a false description following it. And the general rule is, that "Where it is impossible that the grant should take effect according to the letter, there the law shall make such construction as that the gift by possibility may take effect."—that is, the intended gift.—Co. Lit. 183 (b) Bac. Abr., Grant I.

The defendants would read the surrender as if it ran thus:—"All those "parcels or tracts of land, being parts of lots 37, &c., which are described "on the plan annexed as being covered with water." I am not sure, if the deed had been so worded, that it should not be held that the intent to pass only land covered with water was apparent, and ought to controul; but that is not the language of the deed, and to give that effect to the words that are in fact used, would be uneasonable, I think, because it would be supposing that the parties meant to set error above truth, and to prefer the fiction to the reality.—Vide Stratton v. Brown, 4 B. & C. 505, the language of Littledale, J.

There are many analogous cases in the books, as for instance, where

A. grants "all his lands in the parish of B. being the closes E and F," there if he has other lands in the same parish, they will pass; because he sets out with declaring his intention that all his lands in the parish shall pass, and he has only given an imperfect description of them which shall not restrain the general intent of his deed.

So if A should grant "all his land in the occupation of G H, being closes E and F," there if the close is not in the occupation of G H, it will not pass, because it is a mere falsa demonstratio, which does no harm.

But if he should grant all his lands in G, which are in the occupation of G H, there none will pass but those which are so occupied; and if there should be none such in the parish of G, then the grant would be void, for there would be nothing that could pass by the deed. Here the grant is of land covered with water, and the reference to the plan is only for the description of land that answers to that designation.

The rules which determine the effect of the operative words in deeds and wills, as it respects the question of what lands will pass by them, are most important to be understood and observed, because it is only by adhering to them as known principles of construction that purchasers can satisfy themselves or can be safely advised by counsel as to the premises which their titles will cover.

It may be supposed that the point which part of a description is to govern when there is a conflict between the different parts, is one which must by this time have been settled, under almost any circumstances that can possibly occur. I think that point in the present case is clear of difficulty, both upon reason and authority; but having the misfortune to differ, I believe, from all my brother Judges, as to the effect to be given to the deed in this case, I wish to make the ground clear on which my opinion proceeds, and I will endeavor to state succinctly the conclusions I have come to.

1st. I fully agree that as Gildersleeve, the plaintiff in this case, can recover no land except what was conveyed by Mr. George Markland to Sharp, under whom he claims as assignee, the question to be determined is, what are the premises covered by that deed? That is the direct question. The inquiry what land had before been surrendered by Mr. Markland comes up only incidentally, but yet in my opinion inevitably; for I take it to be also clear, that the two descriptions taken to gether, must certainly enclose all the land, and can leave no space whatever between them. The surrender to the crown being the first in point of time, and having a plan annexed to it, to which the subsequent deed to Sharpe expressly refers for information of what is intended to be granted, it must first be settled upon view of the plan and the deed which it is intended to illustrate, what portion of the three lots had been surrendered to the crown, because the front of those lots, so far as the tract surrendered extended, was what Mr. Markland had parted with; and the land which the deed to Sharp designates "as the rear parts of the lots according to Burke's plan" cannot possibly be taken to mean anything else than the portion of the lots represented in Burke's plan as lying behind the tract which he had cut off from the front. So that the solution of the question what tract had been surrendered to the crown? is at the same time the solution of the question, what is contained in the deed to Sharpe? because the latter, referring to the description o the former, professes to grant neither more nor less than the residue The extent of the land embraced in the surrender is therefore in my opinion the key to the construction of Sharpe's deed; for the grant to Sharpe cannot stop short of the only line exhibited in the plan referred to, as dividing the front of the tract from "the rear."

andly: In determining the effect of the deed of surrender, and plan annexed, we are to be governed by what we find to be the evident intention of the two combined, and are to give effect to that intention. The plan being expressly referred to in the deed as annexed to it, and being in fact annexed to it, is to be looked at as part of the deed; and the information which it affords, is to be received as if it were embodied in the description.-14 E. R. 568. Looking at the deed and plan, we are to enquire, not whether the parties did not mean something which they have not expressed, but what they evidently did mean, from the words in which they have expressed themselves; and for this purpose we are to consider all that is written in the deed or on the plan, and all that is delineated on the plan. They both serve to shew us that the government was acquiring by the surrender land in the track of the Rideau Canal, which was covered by the waters of the canal, in order to be protected against any claim for damages in respect to the land so covered. This opens to us a view of the Rideau Canal Act, which we are expressly required judicially to notice, as a public act; and then looking at the surrender taken, as we know it was, in pursuance of that statute, and at the plan, and considering at the same time the object for which the deed was made, we see clearly that, although the government, if they had thought it necessary. might have acquired a part of the land not covered with water, yet that in fact the intention of both parties to the surrender was, that the government should acquire all the land on the three lots which was over-flowed by the canal, and nothing more or less. It would be inconsistent with that intention, and therefore repugnant to the deed, if it were to receive such a construction as would leave the government still exposed to claims for damages, upon the idea that the description being inaccurate, did not enclose all the land covered with water. And as I am convinced that an error on that side could not have the effect of leaving any of the drowned land yet vested in Mr. Markland, so I am satisfied that the same regard to the intention, and the same principle of construction, must prevent more land passing than was or is covered with water, because that would be as clearly contrary to the intention of the parties appearing upon the face of the deed and the plan referred to.

3rdly. Although, in order to give effect to the plain intention of the parties, as apparent on the face of the deed, courts of justice will in many cases adhere to the spirit rather than the letter, where the intention has been inaccurately expressed; and the books are full of instances in which this has been done; yet this case does not require any license of that kind to be used, because all that this deed professes to grant, and all that it does grant in terms, is land covered with water; and without departing from the very language of the grant, it is only such land that can be allowed to pass under it.

I have cited authorities to shew (and I think that point clear), that as the deed is worde I with reference to the plan, no land not covered with water can pass.

If the deed in the granting part had commenced by first granting a

certain close by name, or the land within certain definite limits, shewing the principal and real object to be to pass the close so named, or the land contained within the specified limits, and had afterwards described it as being covered with water, merely as matter of cumulative description, and in the same sense only as it is sometimes stated in deeds and wills who is in the occupation of the land which had before been certainly described; there the land thus evidently intended to be conveyed, would pass, whether it was truly described as being covered with water or not. But here the case is exactly reversed; the deed first anounces that the grantor is surrendering land covered with water, and only that; and the plan referred to does not contradict, but confirms that intention and shews further, that the intention was to grant the whole portion of the three lots which is so covered, beginning at the front and going back to the dry land, no part of which is either granted by the words of the deed, or represented by the plan as being surrendered, but exactly the reverse.

4thly. If we apply ourselves, as I think we must, in the first place to ascertain the extent of the land surrendered, and look, as we must, at the deed and plan for that purpose, then we read in effect as follows: "those parts or portions of lots 37, &c., overflowed by the waters of the "Rideau Canal, being all those parts or portions of the said lots which "are so overflowed, and which may be described as follows, that is to "say, beginning at the concession line in front of the said lots, and run-"ning back to the dry land in rear, including the whole width of the " said lots, and embracing all such parts of the said lots as are over-"flowed by the canal, which are estimated to contain 462 acres, more or "less, and to extend northerly from the concession line 83 chains." Here the intention appears to be to surrender all the land covered with water, and nothing more or less; the operative words of the grant have that effect, and nothing more, and the false description of the land overflowed is to be rejected, and shall not defeat the plain object and intent of the parties.

5thly. If we confine ourselves strictly to the titles which form the plaintiff's case, we shall be led to the same result. For taking up the deed to Sharp, we read that Mr. Markland grants to him "the rear parts," that is all the rear parts of lots 37, &c., as laid down in the same plan referred to; we look at that plan, and find it annexed to a deed which refers to it, and which it is intended expressly to illustrate, and whatever effect the plan and deed have together in establishing a line which is to cut off a portion in front, the same effect must inevitably be decisive in determining what, with reference to that line and that plan, is to be called the rear.

othly. If we interpret the plan by itself, most strictly, and read it in words as composing the description in the deed to Sharp, then the deed would run thus: "all those rear parts or portions of lots 37, &c., which consists of dry land, not overflowed by the waters of the Rideau Canal, and extending from the rear of the said lots, southerly, including the whole breadth of the said lots, and coming down towards the front thereof, till you meet the water line of the Rideau Canal; which said rear parts of the said lots so covered with water, may be more particularly described as follows: that is to say, commencing on the west

"tern side of lot 38, at the distance of 22 chains from the concession line "in rear of the said lots; then easterly, following along the line which "separates the dry land on the said lots from the land covered by the "waters of the Rideau Canal, to the eastern side line of lot 39; then "southerly along the said line to the front of the said lots; then westerly "along the first concession line to the limit between 37 and 38; then "northerly along the westerly limit of lot 38, 83 chains, more or less, to "the place of beginning, containing by admeasurement 123 acres; more or "less." We may understand this as precisely what the plan declares; it shews that what is meant by the "rear parts" is, just the land, and all the land not covered with water. That is at once intelligible and certain; and it discloses further, that the surveyor being required to describe that land describes it as beginning at 22 chains from the rear, and as containing 123 acres. It turns out, that in this he is egregiously mistaken as to distances and quantity, for that the dry land commences nearer 40 chains than 22 from the rear, and contains 264 acres; but that error is a mere falsa demonstratio which signifies nothing.

7thly. I see no difficulty created by the consent rule. The plaintiff, it is clear, cannot recover, unless he shews title to some part of the land of which the defendant admits himself to be in possession, and for which he defends. He does this when he shews, as in my opinion he does, that his deed carries him through the whole extent of the dry land to the canalibecause that carries him down to the distance of 40 chaing or more from the rear, and the defendant claims to hold from the front up to within 22 chains of the rear.

8thly. Any considerations about the price paid, or what it would be just that one party or the other should refund, can have no effect, I think, on the legal question, what does the deed cover? which is strictly a question of legal construction, that requires to be settled first upon such principles as govern other cases; and then we must presume that what is just to be done in the way of compensation, will be done voluntarily or by compulsion of the proper courts of law or equity; and it is very material to consider that as the construction of written instruments, and more especially of conveyances of real property, must be governed by fixed and known principles, the same construction which would give to the crown, under a surrender of land covered with water, 141 acres of dry land wholly apart from the land so covered, must equally have passed the 141 acres, though it might have covered the proprietor's house worth £5,000

These are my views of the case; and I think it right to add for the information of the parties interested, as well as in justice to my brothers who give a different effect to the plaintiff's deeds, that although the late Mr. Justice Jones did not hear the case argued, being in the Practice Court last term, yet we referred to him, and discussed the case with him, being anxious as we always were, to have the advantage, when any difficulty seemed to present itself, of his assistance; and that so far as he could make up his mind upon the first impression, after hearing my opinion and that of the other judges, he seemed strongly to incline to the view which my brothers have taken. I mention this because I feel that much weight is due to the opinion of our lamented brother

judge, whose unlooked for loss, I am sure is felt by the bar, as it is by the bench, to be a great public misfortune.

On these grounds I am of opinion that the plaintiff was entitled to a verdict, first, because the defendant has taken upon himself to defend for all the land south of a fixed point, being 22 chains from the rear end of the lot, though there is absolutely nothing to confine. Sharp's deed to that point; neither the surrender, nor the plan, nor any thing in the evidence, has that effect, for the surveyor expressly swore that he took no means whatever to find how far it would be to the rear of the lot after leaving the drowned land, and the plan is not referred to in the surrender for any other purpose than as exhibiting drowned land, and can consequently not speak with certainty as to any thing else. Secondly, I think that the deed of surrender vested nothing in the Ordnance, beyond the land covered with water; that the land embraced in that surrender is what we are to understand by the front of the waiving line of demarcation, and that as a necessary consequence all the land behind or back of that line is what we must understand to be meant by the "rear part" of the lots, when those words are used in the deed afterwards given to Sharp, This being so, I consider that deed assured to Sharp, and that the lessor of the plaintiff holds as his assignee under an exactly similar description, all the land back of the boundary between Mr. Markland and the plaintiff.

What ought to be the consequence of the surveyor having committed so palpable an error, as regards indemnity, or refunding, to or by one party or another, is in my opinion a consideration wholly distinct from the legal question, what do the deeds cover? It is not in the vain hope of making the construction work perfect justice in each individual case, that certain rules and principles have been laid down by which courts are bound; it is for the purpose of affording something known and certain to rest upon in deciding upon the rights of property. When the right is settled, then what claims may grow out of the decision, it is for courts of equity, and sometimes of law, to determine afterwards; and there are occasionally cases where some injustice must be suffered, in consequence of carelessness and mistakes, after law and equity have done all to remedy it that they can do.

Upon the trial the jury having been directed that the construction and effect of the deed were as I have stated them to be, found a verdict nevertheless for the defendants, and I think there should be a new trial without costs.

In the other case of Doe dem. Gildersleeve v. McElroy and others, the facts are the same, all turning upon the same points as regards the plaintiff's title; and the defendants shewing no title whatever, and being, for all that appears, mere occupants. The same verdict therefore which ought to have been given in the one case, ought to have been given in the other. There is only this peculiar feature in the action against McElroy and others, that the defendant, McElroy, is the widow of Patrick McElroy, who purchased from Mr. Markland the rear end of the lots, after the latter had surrendered to the government all the land covered with water, and which, plainly with reference to the line marked on Burke's plan as describing the boundary between the dry land and the water, he treated as the front. No man can look on that deed of surrender

and the plan, without being satisfied that neither party imagined or intended that any of the dry land was to pass by that deed.

Patrick McElroy, when he had got his bond from Markland, becoming, somehow or other, aware of the blunder which the surveyor had committed (whether in his measurements, or in drawing up his plan, I am not clear) maintained that as none of the dry land could go to the government under the deed, the 141 acres of new-found land fell to him, in addition to the 123 acres, which was all he supposed he was buying; and he was the author of that claim which his assignee, Sharp, set up to the surplus-Now, however, when Mr. Sharp (or which is the same thing, his assignee) strengthened by the relinquishment by Mr. Markland's heir of all claim in his favour, advances the very same claim, the widow of Patrick McElroy continuing on sufferance in the possession which her husband formerly held, takes the other side of the argument, and instructs her counsel to maintain that all the 141 acres belong to the crown, and that the writing to her husband McElroy, and the deed to Sharp, could never have covered any part of it.—See Scratton v. Brown, 4 B. & C. 505, per Littledale, J.

Macaulay, J.—The three lots numbered 37, 38, 39, by the government grant, and by the plan of Mr. Burke, referred to in the surrender of the 12th January, 1837, and the indenture of the 3rd July, 1843, are supposed to contain 600 acres, of which 462 acres 16 rods were surrendered, and 123½ sold to Sharp, at 27s. 6d. per acre, and these two quantities, together with the island, 14 acres, 4 roods, and 6 rods, make up the 600 acres.

This shews that the surrender indenture and island were intended to embrace the whole tract. Now, of this tract, whether more or less than 600 acres, it is clear that in the first place the government paid 27s. 6d. an acre for 462 acres, which at that rate would amount to 635l. 5s., the consideration expressed in the surrender; and that according to the plan and scale of Burke, that quantity represented as covered with water was surrendered and was intended to be surrendered adcordingly.

It is equally clear, that Sharp paid 27s. 6d. an acre for the $123\frac{1}{2}$ acres, which at that rate would amount to 169l. 2s. 6d., the consideration expressed in the indenture, and that according to Burke's plan, that quantity was, and was intended to be conveyed.

Whether the indenture be construed by itself, or in connection with the surrender, it seems to me that it covers only the residue of the three lots in question, exclusive of the 462 acres; but as both are in evidence, it appears that in the first place the 462 acres were surrendered, and afterwards the 123½ acres conveyed. Then in the surrender there is nothing to limit within, or extend beyond, the line laid down in Burke's plan as bounding the tract surrendered, except the terms "over-flowed and "covered with water," in one part, and the words "covered with "water" in another part of the surrender, unless it be the note at the foot of the plan, and the rights of the government under the Rideau Canal Act, and the object of the surrender can be admitted to influence the construction and application of the deed.

I do not see that this can be done, it being plain to me, that although the object was, that Mr. Markland should surrender and the govern ment pay for, only the tract overflowed and covered with water, still it was supposed and assumed, and indeed certified in the plan, that 462 acres were so covered, and that quantity was paid for, and clearly intended to be surrendered. Nor can the expressions "over-flowed and "covered with water" control the residue of the description so as to render the quantity and limit of the land surrendered uncertain, and depending upon the fact of what was actually covered with water. This would be to substitute that which is vague and indefinite to control that which is specific and distinct. If the deed asserts it to be covered with water, the grantor, if material, is estopped from denying it.

It is in the commencement generally described as a parcel or tract of land "over-flowed and covered with water," but afterwards specially described as being part of lots 37, 38, and 39, in the 3rd concession of Kingston, containing by admeasurement 462 acres, more or less, and more particularly described in the plan thereof thereto attached.

The plan is referred to as describing it, and according to the scale given, it does contain by admeasurement rather more than 462 acres. It seems to me in vain, after this, to contend that the extent covered with water (however more or less than 462 acres) and not the quantity by admeasurement according to the plan, should govern.

The question has arisen, because less than 462 acres is so covered, but were the fact otherwise, and were 562 acres covered with water, and were the government claiming the excess, it might be more questionable; but even then, and with the aid of the certificate at the bottom of the plan, I do not see how it could be well said that the whole was included in the surrender, where it is ascertained by a plan and scale, shewing that (whatever might in all be covered with water) it was 462 acres only that were surrendered.

For the purpose of the surrender, all upon Burke's plan north of his waving line, may be rejected, and the plan be looked upon as if it contained nothing but the lines bounding the tract of 462 acres to be surrendered, and if so, how could it be afterwards limited or extended under the description given according to the extent to which the three lots were overflowed and covered with water. There could be nothing to warrant its being limited; nothing to justify its extension, unless the certificate at the foot of the plan could be held to warrant it, an effect of which I do not think it susceptible. If the plan is not to govern, it can be of no use, and may be rejected; but without its aid the premises could not be ascertained, for the description does not say all the land covered with water, and is manifestly imperfect without the plan.

As used, the words "over-flowed and covered with water," and "co"vered with water," are parenthetical, and might as well be omitted, for
if read without them, the description is in effect just the same. The being
covered with water, is a circumstance supposed, that may or may not
correspond with the real fact, and being in no wise necessary to the ascertainment of the subject matter of the surrender, is immaterial as descriptive of the premises.

The observation of Lord Denman, in Doe Smith et al. v. Galloway, 5 B. & Ad. 4, 43, appears to me quite applicable. In reference to the controlling effect of the supposed occupation of a person named Smallbones, conteded for in that case, he said, "Suppose premises described by

"reference to a coloured plan, and the words had been 'all that part "coloured green, and now in the occupation of A. B.,' all the green "must have passed, though some of it had not been in the occupation of "A. B."

So here, were the description transposed and the tract described as parts of lots 37, 38, 39, containing by admeasurement 462 acres, and more particularly described in the plan thereof, hereto attached, and overflowed and covered with water, all described in the plan must pass, though some of it was not covered and overflowed with water. By substituting the words "over-flowed and covered with water" for "now in the "occupation of A.B." and "containing by admeasurement 462 acres, more or less, and more particularly described in the plan thereof, hereunto "attached," for, "all the green in the coloured plan referred to,"—the illustration would bear close analogy.

The admeasurement quantity and line of demarcation contained in Burke's plan, being equivalent to the coloured part of the plan supposed by Lord Denman; and the occupation in the one case, or the being over flowed and covered with water in the other, being superfluous and imma terial. The word thereof refers to land—all that tract of land more particularly described in the plan "thereof," hereunto attached.

So the description in the indenture conveying to Sharp, is equally explicit, being the parts of 37, 38, and 39, as laid down by the same plan of Mr. Burke, and therein stated to contain 123\frac{1}{2} acres.

There is nothing in this description, or in the plan, by which the line laid down by Burke could be shifted, so as to embrace a large portion of the 462 acres which on the plan it excludes.

That line is laid down as bounding 462 acres from the front of the lots, and the rear parts mentioned in the Indenture are those portions of the lots on the opposite side of it, or beyond the 462 acres, in other words beyond two lines drawn from the front on the east side of 39 and west of 37, up to the points indicated by Burke's line, according to the scale given by him for measuring the plan, and by which scale the distances would embrace 462 acres—Burke's plan is made the medium of description in both cases—and the lands surrendered and conveyed are to be ascertained on the spot by the application of that plan to the three lots in question, according to the scale by which they are laid down and designated on such plan. (See Llewellyn vs. the Earl of Jersey et al. 11 M and W. 133; 4 B and C.485; 15 E. 309.)

In my opininion the Board of Ordnance owns 462 acres whether covered with water or not, and the lessor of the plaintiff claiming under Sharpe is entitled only to the residue, exclusive thereof. If in the surrender a mistake has inadverently been committed, by including as covered with water more land than was really overflowed, contrary to the intention—it may perhaps be rectified in a court of equity, by the Odnance being decreed to restore the surplus not so over-flowed, and the heir of Mr Markland being decreed to return the price received therefor; but so long as the crown has paid for 462 acres I think the Ordnance entitled to retain it according to the intent and meaning of the parties, as expressed on the face of the deed and plan, and which a court of law cannot control, alter or set aside. At all events, it is a matter between the government and Mr. Markland's heir at law in which the lessor of

the plaintiff had no legal interest that I can perceive. (Note—If material, is not Markland estopped from saying the 462 acres are not covered with water.)

McLean, J.—It is, I think, quite clear, that Mr. Markland only sold to Sharp the quantity of land which he considered was remaining as his property, after the surrender of 462 acres to the crown of the lots in question. And it is also clear, that in order to prevent any difficulty or clashing between the government and Sharp, he conveyed to both according to the same plan, transferring or surrendering to the crown all the land south of a certain line on that plan as land covered with water, and conveying to Sharp afterwards the rear part of the lots, as laid down on the same plan.

Had this conveyance been merely of the rear parts of the lots, without specifying any particular mode by which the quantity of land or the southern limit could be ascertained, then, as the preceding conveyance or surrender to the crown only embraced land covered with water, giving the quantity as more or less, the rear parts of the lots, including all the land not covered with water, would probably pass to Sharp under that deed, and the lessor of plaintiff, as his assignee, would be entitled to recover. But the deed to Sharp conveys to him the rear parts of 37, 38 and 39, 5th con. of Kingston, as laid down on a certain plan drawn by Mr. Burke, the surveyor, and by him stated to contain 1232 acres. The plan is thus incorporated in the deed, and necessary for the purpose of shewing the land actually conveyed. To ascertain what is meant by the rear parts of the lots, it becomes necessary to refer to the plan, and then it is seen that the front 462 acres are marked as being covered with water; and the evidence shews that these 462 acres were surrendered to the crown as covered with water.

The right of the crown to hold land which has never been covered with water, under a deed which on the face of it professes to surrender only land covered with water, may be very questionable; but, as the surrender to the crown was up to a certain line laid down on a plan attached to the deed, and the conveyance to Shatp, under whom the lessor of plaintiff claims, was for the rear parts of the lots according to that plan, and there is a scale by which the exact position of the line laid down on that plan can be ascertained, I do not see how any more can pass to Sharp, or the lessor of plaintiff as his assignee, under the designation of the rear parts of the lands, than what remained of the lots in the rear or north side of that line.

The surrender to the government professes to be for land covered with water up to that line; the deed to Sharp is for the rear part of the lots, that is, for the portion of the lots appearing by the plan to lie between that line and the rear limit of the concession; and whether all the land in front is or is not covered with water can, as it appears to me, make no difference in the plaintiff's right to recover. He has purchased the rear parts of certain lots, as marked on a particular plan, and he has no right to claim an increased quantity of land because some of the front, which was supposed to be overflowed and covered with water. proves not to be so. His deed takes him only to the line on the plan, which was intended to mark the division of the dry land, and the land covered with water.

It appears to me that the verdict is right according to the evidence and, therefore, the rule nisi for a new trial must be discharged.

DRAPER, J.—This is an action for land in the township of Kingston, described in the consent rule as "those" parts of lots 37, 38, and 39, in "the fifth concession of the township of Kingston, in front or south of the "REAR PART of the said lots" and described thus—"commencing on the westerly side line of the said lot No. 37, at the distance of 32 chains from the north-west angle of the said lot No. 37, then south along the westerly side line of the said lot No. 37, thense or less to the south-west angle of the said lot No. 37; thence east along the front of the said 5th concession 57 chains more or less to the south-east angle of the said lot No. 39; thence north along the easterly side line of the said lot No. 39 83 chains more or less, until within the distance of 22 chains from the north-east angle of the said lot No. 39 on the said easterly side line of the said lot No. 39; thence in a south-westerly course 61 chains, "more or less, to the place of beginning, containing by admeasurement 462 acres, more or less.

The lessor of the plaintiff derives title under the late Thomas Markland, Esq., to whom the crown granted No. 37, 38, and 39, 5th concession of the township of Kingston, described by metes and bounds as containing 600 acres. By indenture, dated 3rd July, 1843, and made between George H. Markland, heir at law of Thomas Markland, George Henderson and Henry Sharp (after reciting that the said Thomas Markland had, on the 22nd of December, 1837, given a bond to one Patrick McElroy, conditioned on payment of £169 2s. 1od., to convey the lands in the indenture mentioned to McElroy in fee, that McElroy had assigned his interest to Sharp—that the £169 2s. 10d. was paid that Sharp had filed a bill in Chancery against George H. Markland and George Henderson, complaining that George H. Markland had conveyed some part of the premises to George Henderson, and that this indenture was made to put an end to that suit), in consideration of the premises, and of, &c., the said George H. Markland and Geo. Henderson conveyed to Sharp in fee "all those certain tracts or parcels of land "situated, lying and being in the township of Kingston, and being the "rear parts of lots Nos. 37, 38 and 39," &c., "as laid down on a certain "plan drawn by Mr. Burke, the surveyor in the 5th concession of the "township of Kingston, and by the said Mr. Burke stated to contain 1232 "acres." The lessor of the plaintiff claims and is entitled to whatever land passed by this deed to Sharp. The plan referred to-as to the identity of which there is no dispute—is drawn on a scale of equal parts, laid down thereon.

By that scale these three lots are laid down as three parallelograms, each of 19 chains some links front, by 105 chains in depth, and as containing each 200 acres. At the distance of 84 chains, or nearly, from the south-east angle of No. 39, and on the easterly side line of that lot an irregular wavy line is drawn in a south-westerly direction across 39, 38 and 37 to a point on the westerly side line of No. 37, distant from the south-west angle of that lot about 77 chains. There is nothing else whatever in this plan to divide these lots—to se parate front from rear—or to designate what the rear parts consist of By the plan, the rear parts appear to be bounded on the north by a

straight line parallel to the front or southern boundary of the lots, i. e. parallel to the 5th concession line; on the east and west by the straight lines, being the side lines of the respective lots; and on the south by the wavy line already mentioned; and the contents of the rear parts so marked, are severally designated to contain, number 37, 51 acres and 12 ods, number 38, 38 acres and 4 rods, number 39, 34 acres and 8 rods, in ll 123 acres, 24 rous.

If the plaintiff's case stopped here, and he rested on the construction of this deed, such as the court would give it, on its own terms, and the information afforded by the plan referred to as descriptive of the land granted, it cannot be denied that the wavy line marked on the plan, constitutes the plaintiff's southern boundary. The court would hold, that although no length of the side lines of the front part was given, yet that length could be ascertained on the plan by the scale of equal parts, and that the plaintiff had only to mark on the ground what was designated on the plan, and he could thus certainly ascertain the precise limits of his property. For in this mode he could ascertain his front or southern boundary, and from thence he would have right and title to the rear of the fifth concession; and it is not even surmised that he will not thus obtain 123 acres and 23 rods: on the contrary, in the argument it was stated on both sides, that the lots exceeded the width mentioned in the crown grant, and contained together more than 600 acres; and he will gain a proportionate difference.

But the lessor of the plaintiff claims about 141 acres more of these three lots, lying in front of this wavy line-contending that the surveyor has erroneously placed it where it appears on the plan, and that in fact it should have been laid down much more to the south-so as in effect to divide the lots into two nearly equal portions. To prove this, he shews that, while Mr. Markland, senior, owned these lots, the Rideau Canal was constructed; and he calls the attention of the court to the powers conferred on government by the statute of Upper Canada 8 Geo IV. chap. r-which authorises the officer employed by his Majesty to enter on any lands, to set out and ascertain such parts as he shall think necessary for making the canal, &c., and all such other improvements, &c., as he shall think proper, for making, effecting, preserving, using, &c., for the said navigation; and after any lands shall be so set out and ascertained, to contract with the owner for the surrender of so much as shall be required, or for the damages occasioned by the construction of the canal; and enacts (sec. 8.) that such parts or portions of land or lands covered with water, as may be so ascertained and set out as neces sary to be occupied for the purposes of the canal, shall be for ever thereafter vested in the crown. He further proves that owing to the dams and erections made in constructing the canal, a portion of these lots was overflowed with water; that Mr. Burke (the surveyor named in the deed of the 3rd July, 1843) was employed to ascertain the quantity overflowed, which it had been agreed Mr. Markland should be paid for, at the rate of 27s. 6d. per acre; that he chained from the front of No. 39, on the east side of that lot, a distance exceeding 80 chains; and also chained on the west side of No. 37, a less number of chains, supposing in each case that he had gone to the edge of the water overflowing part of the lot; that he drew his plan to correspond with the

distances so measured, and meaning to represent the lots as overflowed from the front to the wavy line, which is drawn from one of these parts to the other; and that (with the exception of a small island contain. ing 14 acres, 3 roods) he computed the quantity by this measurement at 462 acres. The plaintiff further proved a subsequent survey in 1842, by another surveyor, by which it appeared that the water did not extend nearly so far back as 80 chains from the south-east angle of 39, or as 72 chains from the south-west angle of No. 37; but on the contrary, the water only extended so far back as to overflow about 320 acres, instead of 462, and that these lots exceeded the width assigned to them in the crown grant, by a rod at least. It seems Burke's survey was made in the winter, probably when there was snow on the ground, but it is not explained what misled him as to the extent from the front of the lot which was overflowed, for his error is not in the computation of the number of acres contained within the limits he measured and laid down on his plan, but in the limits themselves, as shewing how far back the water extended. Evidence was also given that McElroy, when he was in possession under the bond from Mr. Markland of 22nd December, 1837, claimed up to the water's edge. It was further shewn that Geo. Henderson, who joined in the conveyance to Sharp, had at one time been in the possession of the land lying between the wavy line as traced on the plan and the water's edge on the lots, being a space of about 141 acres south of the 1231 mentioned as sold to McElroy, and north of the parts of these lots actually covered with water. That he had made a purchase of this from Geo. H. Markland, but gave it up when Sharp filed the bill in chancery referred to in the recitals in the deed of July, 1843; whereupon Sharp took possession and held either by himself or by tenants to the water's edge, for two or three years, when he ceased to be owner. And here the plaintiff closed his case; and after the fullest consideration of all these facts, and admitting them all properly receivable in evidence to explain and point the construction of the deed of July, 1843, on which the defendant's counsel has raised no question, I am still of opinion, that the wavy line on the plan must govern, and that it so far conclusively determines the front or south boundary of the land conveyed, to be at such a distance from these three lots, as is ascertained by admeasurement according to the scale given on the plan, for that represents the distance measured by the surveyor on the ground.

It is to me perfectly obvious, that Mr. Geo. H. Markland conveyed according to the very letter of the bond given by his father in Dec. 1837. He was aware before and at the date of the deed, of Sharp's pretensions; had he meant to recognise them absolutely, nothing could have been easier than so to have expressed the description; by conveying all the rear part of the lots "not overflowed or covered with water," or by designating the edge of the waters of the Rideau Canal as the southern boundary; or by giving a description by metes and bounds (which the surveyor employed in 1842 could have furnished) extending the measured distance from the rear to the water's edge, he would have put the matter beyond dispute. But though desirous of avoiding a suit in chancery on the one hand, he had every reason to avoid the possibility of subjecting himself to an action for breach of covenant on the other; and to

such an action he must have subjected himself, if he had described the land in the unequivocal manner suggested, and it had turned out that his father had surrendered all the land south of the wavy line to the crown. He must be taken to have said to Mr. Sharp, "I will convey to "you strictly in the terms of my father's bond. If those terms will give "you a legal right to hold 264 instead of 123 acres, you will gain that "advantage. For all I know, the additional 141 acres are surrendered to "the crown, and I will not convey to you by such a description as will "in that event subject me to a future claim from you." It is to me equally obvious, Sharp felt he could insist on more than he obtained, for he would not have given up his suit in chancery, by taking a deed of "rear parts" of these lots "as laid down" on Mr. Burke's plan, if he could have insisted on a description clearly embracing what the lessor of the plaintiff now claims.

It was however proved on the defence, that Burke took for granted that these lots contained just the quantity mentioned in the patent, viz. 600 acres; and having by the measurement already referred to, satisfied himself that 462 acres, 16 rods were overflowed, he added thereto the contents of the small island, deducted the sum from 600, and assumed 123 acres 24 rods as the remainder, and drew his plan accordingly. The Ordnance department adopted his plan, and paid Mr. Markland for 462 acres at 27s. 6d. per acre, and took a surrender from him to the crown, dated 12th January, 1837, whereby in consideration of 635l. 5s., he conveyed "all that parcel or tract of land overflowed and co-"vered with water, situate in the township of Kingston, and being com-"posed of part of lots Nos. 37, 38 and 39, in the 5th concession of the "såid township of Kingston, containing by admeasurement 462 acres "more or less, and more particularly described in the plan thereof, here-"unto attached, to the intent and purpose that the said land and pre " mises (covered with water) hereby surgendered, shall vest in the crown.' This plan is the same that is referred to in the deed of July, 1843, upon it is written a certificate, signed by Burke, dated in July, 1835, "that the above diagram is drawn from actual survey, and in accordance "with the deed held by the proprietor, that there are 462 acres 6 "roods, 16 rods, permanently drowned by the waters of the Rideau "Canal." Burke (being called for the defence) swere, that all the land south of the wavy line on the plan, was meant to represent land covered with water. It was then proved, that Burke was clearly in error as to the extent of the lots which was overflowed, and that in fact not more than 320 acres were covered with water. And upon these additional facts it is insisted that the plaintiff is at all events entitled to recover, and that the verdict given for the defendant should be set aside, for that Sharp was entitled to all not surrendered to the crown, and under this surrrender the crown can take nothing which is not covered with water. And this is substantially the question before the court, who are thus in fact called upon to decide the rights required by the crown under the surrender of January, 1837, though for all that appears the crown is no party to this defence.

For the purpose of satisfying Mr. Markland for damages done to his property, as well as for the purpose of obtaining a surrender of a certain quantity of his lands, I think the acts of Mr. Burke, in surveying, setting-

out and ascertaining the extent of damage, and the quantity of land to be surrendered, are to be considered as done under the authority of the Rideau Canal Act; and if the verdict of the jury may be taken as affirming the evidence of Burke, that he made a measurement in order to set out and ascertain what was necessary for the purposes of the canal, and did in fact set out what his plan represents, then I think that although he was in error as to the land so set out being covered with water, a deed adopting the plan by which the land he actually set out is shewn truly, both as to the length and breadth and also as to the number of acres, and conveying that number of acres according to that length and breadth, and for a full consideration, namely, one computed on the number of acres conveyed-must prevail in a court of law; and that if Mr. Markland or those claiming under him have any ground for relief on account of this being a mistake by which they are injured, it is not in this court that it can be obtained. I treat the plan as incorporated with the surrender, and I take the effect of the two to be precisely the same as if, instead of saying "more particularly described in the plan thereof "hereunto attached," these words had been used, "more particularly "described as follows," and then set out a description in words tantamount to the description in the consent rule. But without relying on the effect to be given to this deed as a conveyance of land previously set out and ascertained under the Rideau Canal Act, and as containing words amply sufficient in themselves to effectuate that intent, and to convey all the defendant insists passed by that deed-still, confining myself to the deed and plan, and to the acts of Mr. Burke in measuring and making the plan-I see nowhere an indication of any other intent on the part of Mr. Markland's than to convey 462 acres 16 rods off the front of three lots, by precisely the boundaries which the plan indicates; and if it is proper to refer to Mr. Markland's own statements connected with these lots, they confirm this view of his intent-for he appears to have expressed himself satisfied to assume the lots at 600 acres, though perhaps they might contain more; and having been paid for 462 acres, retaining the island equal to 14\frac{3}{4} acres—he was satisfied to be paid by McElroy for 123 acres, at the same rate he had been paid by the government, viz., 27s. 6d. per acre, and accordingly in December, 1837 long before Burke's mistake is shewn to have been discovered—he binds himself to sell the rear part of these lots as laid down on Mr. Burke's plan, for 1961. 2s. 6d.

Then the question is really reduced to this—do the words "all that "parcel or tract of land overflowed and covered with water," &c., &c., "and more particularly described in the plan thereof hereunto attached"—limit the operation of the surrender to land covered with water, so as to convey only about 320 acres instead of 462 acres, as is expressed. To raise this question, the description must be treated as two-fold. One part is—"all that part of these three lots covered with water;" the other is the particular description exhibited by the plan which, as I have already observed, I consider incorporated with the deed, as if the lines traced thereon were stated in the deed by express courses and distances, of such extent as to embrace 462 acres within their area, exclusive of the island. One of these is inaccurate, i. e., falsa demonstratio; and therefore is to be rejected. I do not understand that any reliance is

placed by the plaintiff's counsel on the fact, that the words "overflowed or covered with water," precede the statement of the quantity-462 acres -or the reference to the plan attached. The language of Hobart, C. J. (Hob. 17), is an answer to any such notion, if it be entertained—indeed, in "one sentence it is vain to imagine one part before another; for though "words can neither be spoken nor written at once, yet the mind of the "author comprehends them at once-which give vitam et modnm to the " sentence." I treat the description, therefore, as if it had been of " all "those parcels of land being parts of lots, &c., particularly described in the "annexed plan, and which now are overflowed or covered with water." And then the language used in Doe v. Galloway, 5 B. & Ad. 43-51, affords the true rule of construction, namely, that where "there is a sufficient "description set forth of the premises, by giving the particular name of a 'close or otherwise, we may reject a false demonstration—but that if "premises be described in general terms, and a particular description be "added, the latter controls the former." So that admitting the words "overflowed or covered with water" as they stand in this deed, to be substantially words of description, still they are but words of general, and not of local description, and are therefore liable to be controlled. There is no difference in effect whether the property be described by a particular name, or in the absence of that, by particular limits. I take it that if this had been a conveyance of the whole three lots 37, 38 and 59, instead of a part, that the whole would have passed, though introduced as "all that "parcel or tract of land overflowed and covered with water," if followed by "being composed of lots 37, 38 and 39, in the 5th concession," &c., &c.; and I cannot distinguish between that and a conveyance of "all that "parcel or tract of land overflowed, &c., being composed of parts of lots No. 38, &c., and then described by courses, distances, and admeasured contents. For otherwise, in either case, if there were no land covered with water nothing would pass by the surrender to the crown, and the defendant's deed for the rear parts would cover the whole lots, or be wholly void.

It appears to me therefore, that the words "overflowed or covered with water" must be treated either as a mere demonstration or affirmation, which cannot prevail against a positive description; or that admitting them to be descriptive, they are general, and must be controlled by the particular description which follows. I refer to the following authorities, most, if not all of which, have been already cited by my learned brothers:—Cro. Car., 546; Plow, 191; 5 East, 51; Dyer, 376, b.; 1 B. & A. 550; 7 M. & W. 41; 1 M. & S. 299; Cro. Car., 129; 5 B. & Ad. 43; 8 Bing. 248; 3 Ves. J. 366; 1 P. Wms. 286.

The plaintiff's construction is, that the wavy line divides the lots into a front part and a rear part; and that coupled with the words in the deed, and the facts on the ground, the 'result is that the front part as shewn by the plan, is only that part of the lots which is covered with water, and the rear part is all that which is dry land. Having arrived at a conclusion in opposition to his construction of the deed, I feel it unnecessary to enquire how in the face of his own argument he can recover any "parts of lots 37, 38 and 39, in the 5th concession of the township of Kingston, in front, or south of the rear part of the said

lots "—which is what is defended for: for if the rear part means all the dry land, then a defence for what lies in front or south of that, is a defence only for land covered with water: and it will hardly do for the plaintiff to refer to the particular description by metes and bounds contained in the consent rule, as varying the meaning of the words "front parts" or "rear parts," when he has throughout denied such an effect to a substantially similar description in the deed of July, 1843, invoking the aid of the words "covered with water" in the surrender of January 7, 1837, to extend the boundaries given in the deed under which he claims.

On the whole, I am of opinion the verdict for the defendant is right, and therefore the rule should be discharged.

Per Cur.—Rule discharged.

ROBINSON, C. J., dissentiente.

ADAMSON V. McNAB.

A sues B. in an action on the case for injury to his mill, by diverting the water of a stream at a point above—B. pleads in justification, that A. had erected a dam which penned back the water and made it overflow on defendant's close, wherefore the defendant dug trenches into the stream to lead off the water, as he had a right to do.—Held bad on demurrer.

Declaration on the case.—Ist count—that the plaintiff before and at the time of committing the grievance aftermentioned, was possessed of a mill and premises, and by reason thereof ought to enjoy the water of a certain stream, &c.; yet that the defendant, to deprive the plaintiff of the water of the said stream, &c., to wit, on the 1st day of May, 1842, and on divers days since, wrongfully cut, dug, and made, in and out of the sides of the said stream, above the plaintiff's premises, divers sluices, trenches, channels, and cuts, and thereby wrongfully diverted and turned large quantities of the water of the said stream out of, and away from the mill premises of the plaintiff, whereby for want of water the plaintiff could not work his mill.

and count—alleged the plaintiff's possession of a certain other mill and premises, near to a certain other stream, river, or water course; yet that the defendant cut trenches, &c., so near to the said stream that the water broke through and escaped, &c.

3rd count—alleged the plaintiff's possession of a close near to, and adjoining a certain other stream; yet that defendant wrongfully diverted it.

4th count—alleged the plaintiff's possession of another mill and premises near another stream or water course, the banks of which the defendant ought to have repaired; yet the defendant suffered them to be ruinous, &c., whereby divers large quantities of water escaped, &c.

5th count—alleged the plaintiff's possession of another mill and close near to a certain other stream or water course; yet that the defendant wrongfully widened divers feeders, sluices, cuts leading out of the said stream, and thereby drew off and diverted large quantities of water.

5th plea, a special justification.—And for a further plea as to wrongfully and unjustly cutting, digging and making, and causing to be cut, dug and made, in and out of the sides of the said stream, river or water-course, in she said first count mentioned, above the said mill

and premises therein also mentioned, the sluices, trenches, channels and cuts in the said first count referred to, and keeping and continuing, and causing to be kept and continued, the said sluices, trenches, channels and cuts on the sides of the said stream or water-course, and thereby diverting and turning large quantities of the water of the said stream or water-course, as in the said first count alleged; and as to the cutting, digging and making, and causing to be cut, dug and made, trenches and cuts, in the said second count referred to, and so near to the said bank or side of the said stream or water-course, in the second count mentioned, and above the said mill and premises of the plaintiff, as in that count mentioned, whereby the water of the said stream broke and burst through the said last-mentioned bank or side of the said stream, and ran and flowed into, over and upon the said last-mentioned trenches and cuts. and by reason whereof, &c., as in the said second count alleged; and as to wrongfully and injuriously diverting and turning large quantities of water of the said stream or water-course, in the third count of the said declaration mentioned, out of the same and away from the close of the plaintiff, in that count mentioned, as in the said last-mentioned count alleged; and as to wrongfully and injuriously widening, deepening and enlarging the feeders, sluices and water-courses leading from and out of the stream or water-course in the said last count mentioned, and keeping and continuing the same so widened, deepened and enlarged, as in the said last mentioned count alleged, and thereby diverting and draining off the water of the said stream, and hindering and preventing the water of the said stream from supplying the mill of the plaintiff, as in the said last count alleged-the defendant says that the plaintiff ought not to have or maintain his action against him, the defendant, in respect thereof, because he says that long before and at the time of committing the alleged grievances, in this plea before mentioned, the said defendant was, and from thence until the commencement of this suit hath been lawfully possessed of a certain close, called and known as the east half of Lot No. 12, in the 11th concession of the township of Esquesing, in the Gore District aforesaid, situated just above the said mills, close and premises of the plaintiff, and a little higher up the said streams, rivers and water-courses than the said mills, close and premises of the plaintiff, respectively mentioned in the counts in the introductory part of this plea referred to, through and over which close of the defendant the said streams, rivers and water-courses for a long time before committing the said alleged grievances had run and flowed, and of right ought to have run and flowed, and at the time of committing the said alleged grievances still ought to run and flow through and over the said close of the defendant, in their free, natural and uninterrupted channel and course, and the defendant, by reason of such possession of his said close during all the time last aforesaid, by right ought to have had the water in the said rivers, streams and water-courses last mentioned, to run and flow over and through his said close, in their free and natural channel and course, and without interruption; and the defendant farther says, that before the committing the said alleged grievances by the defendant, herein before in this plea mentioned, and while the said defendant was possessed of his said close, to wit on the first day of January, in the year of our Lord 1830, a certain dam and a large quantity of timber

and lumber, to wit, one hundred pieces of timber, and one hundred boards, and one hundred planks, were wrongfully and unjustly put, placed and erected in, upon, over and across the said river, streams and water-courses, just below and near the said close of the defendant and the same were by the plaintiff continued and kept erected there for a long time, to wit, from thence until the commencement of this suit, whereby the waters of the said rivers, streams and water-courses were wrongfully and unjustly hindered and prevented, during all the time last aforesaid, from running and flowing through, over and across the said close of the defendant, in their free and natural channels and courses. and without interruption, as they ought to have done, and otherwise would have done, and were also thereby wrongfully and unjustly penned back, raised and forced over the bank and sides of the said rivers. streams and water-courses, and out of the natural channels and courses thereof, and in, upon and over the said close of the detendant, and the said waters, by means of the premises, during all the time last aforesaid, were wrongfully and unjustly continued penned back, raised and forced over the banks and sides of the said rivers, streams and water-courses, and out of the natural channels and courses thereof, in, upon, and over the said close of the defendant; and the defendant further saith, that afterwards, and while the said water was so wrongfully and unjustly penned back, raised and forced over the banks and sides of the said rivers, streams and water-courses, and out of the natural channels and courses thereof, and in, upon and over the close of the defendant as aforesaid, he the said defendant, to wit, on the said days and times in the said first, second, third and last counts of the said declaration mentioned of the committing by the defendant of the alleged grievances in the introductory part of this plea mentioned, and while he possessed the said close as aforesaid, and for the purpose of draining and carrying away from and off the said close of the defendant the said water so wrongfully and unlawfully penned back, raised and forced over the banks and sides of the said rivers, streams and watercourses as aforesaid, and out of their natural channels and courses, in. upon, and over the close of the defendant; and to prevent the water from damaging, killing and destroying the trees, herbage and grass of the said defendant, then growing and being in and upon the said close, and to hinder and prevent the water from saturating, damaging and spoiling the land and soil of the said close, he the said defendant did dig and make certain small trenches, sluices, channels, cuts and drains in the banks of the said rivers, streams and water-courses within the said close of the defendant in the first, second and third counts mentioned and did then also a little widen, deepen and enlarge the feeders, sluices and water-courses leading from and out of the stream or water course in the said last count mentioned, within his said close, whereby divers quantities of the water of the said rivers, streams and water courses so perined back, raised and forced over the banks and sides of the said rivers, streams and water-courses, and out of the natural channels and courses thereof, and in, upon and over the said close of the defendant, that otherwise would have run and flowed to the mills, close and premises of the plaintiff, were to effect the purposes aforesaid, necessarily diverted, turned away and carried from the said mills, close and premises of the plaintiff, as the defendant lawfully might for the cause aforesaid, which are the grievances in the introductory part of this plan mentioned, and this the defendant is ready to verify, &c.

Demurrer to 5th plea.

rst. For that although the plea in the introductory part professed to answer the grievances in the first, second, and third last counts mentioned; yet in fact it only answered the case of action in the last count mentioned.

2nd. And also for that the plea admitted the grievances mentioned in the said counts.

H. J. Boulton, Q.C., for the defedant, cited 6 E, 208; 3 B. & Ad. 304—contending that the defendant had no right to divert any portion of the water from the stream, because the plaintiff had raised the height of the water in the stream by his dam below.

Freeman and Vankoughnet, contra, contended that the plea was a sufficient justification, cited 6 C. & P. 259; IB. Ad. 874; 8 Bing. 204; IA. & E. 822; 3 N. & M. 739; IA. E. 493; 3 B. & Ad. 871; Bac. Ab. nuisance; Angel on water-courses, 138; IU. C. R. 135.

ROBINSON, C. J.—The fifth plea professes to answer the substantial injuries complained of in all the counts except the fourth; and it expressly undertakes to answer the complaint in the first count, of digging sluices in and out of the sides of the plaintiff's stream above the plaintiff's mill, and thereby diverting the water of the stream; and also the general charge in the third count of diverting and turning large quantities of the water of the stream, out of the stream: and the defence pleaded is "that the plaintiff before the alleged injury, wrongfully kept and continued a dam upon the stream below the defendant's close, whereby the waters were penned back, raised and forced over the banks of the stream, out of their natural channel upon and over the defendant's close; and that he the defendant, for the purpose of draining off from his close the water so penned back, raised and forced over the banks and sides of the stream, out of the natural channel, and over his land, dug and made sluices and cuts in the banks of the river, as in the first count mentioned, within his own close, whereby divers quantities of the waters of the stream which were so penned back, raised and forced over the banks of their natural channel, and upon and over the defendant's close, are necessarily diverted from the plaintiff's mills."

The effect of this plea is to assign as a reason for digging trenches into the banks and sides of a stream, and thereby diverting water out of the stream, that the plaintiff had by damming up the stream below, forced water over the banks upon the defendant's land: but the water which the plaintiff had forced out of its channel and over the banks, could not be taken out of the stream through the defendant's sluices; and therefore if the plea means anything, it can only mean that because the plaintiff had forced some of the water over the defendant's land, the defendant was justified in diverting other water out of the stream that had not been forced out of its channel over the defendant's land—in other words, because the plaintiff has committed one wrong (which the throwing back water out of the stream over the defendant's land would certainly be, unless some privilege of doing so were shewn), therefore the defendant was justified in committing another wrong by diverting the water out of

the stream by sluices cut into the banks, to the prejudice of the occupant below.

I think such a defence cannot be supported, and that the plea is substantially bad; Mason v. Hill, 2 N. & M. 756; McLaren v. Cook et al., 3 U. C. R. 239; 3 B. & Ad. 312; 1 Sim. & Stu. 190; for it is repugnant in itself, since the defendant could not divert from its channel, as he says he did, the very water which had before been forced by the plaintiff out of its channel and over the banks of the stream.

If we should pass over what appears to me to be this evident inconsistency in the plea, and should take the language in the sense most favorably for the defendant, it asserts this principle—that whenever the owner of land on a stream has erected a mill on it, and has increased the fall by raising the water, however little, in the mere bed of the stream, forcing none of it over the banks, or out of its course, and occasioning no injury to anyone, it shall yet be lawful for any one who comes afterwards and occupies the land higher up, to dig a trench into the stream, and lead out of it all the water that has been raised above the ordinary level, which could indeed never be precisely ascertained, there being scarcely any two days in the year on which the natural level would be precisely the same.

The defendant in his plea has alleged no injury to himself except from the water which was forced over the banks and sides of the stream, and that injury could not excuse him in turning the water out of the stream; and until he shews himself to be in some way injured by it, I am not prepared to say that he can complain of the water being merely raised in the bed of a stream, as a wrong done to him.

MACAULAY, J.—I concur in thinking the plea insufficient; my only doubt is, whether what I look upon as the principal objection thereto, is sufficiently pointed at in the causes of demurrer assigned, for no other are noted in the margin of the demurrer book.

I am not satisfied that the plea is bad because it is pleaded as to four counts of the declaration, if it sufficiently answers each and all of them; in other words if it answers all that which in the introductory part thereof it professes to answer, and thereby embraces the gist of those several counts.

If the plea was traversed, the application thereof, at the trial would depend upon what the plaintiff proved as the wrongful acts of which he complained or for which he sought damages.

The plea alleges that a certain dam (as if one only) and a large quantity of timber and lumber were wrongfully put, placed, and erected in, upon, over, and across the said rivers, streams, and water courses, whereby the waters thereof were wrongfully penned back, raised and forced over the sides thereof, and out of the natural channels and courses thereof, in, upon and over the defendants close; the waters may have been penned back and raised in and upon the defendant's close, without being forced over the banks and sides of the said rivers, streams and water-courses, and out of the natural channels and courses thereof, in, upon, and over the defendant's said close, and both are alleged, still the plea does not aver or shew that any damage or nuisance was occasioned to him, by the mere penning back and raising the water, as that it hindered or impeded him in the enjoyment of the streams or water-courses

within their banks or sides, or that it percolated or oozed from and through the banks or sides of the said rivers, streams, and water-courses. or any of them in, upon, and over, parts of the defendant's close, other than and different from the bed, or within the banks and sides thereof, whereby he was damaged.

And yet he goes on to justify the diverting of the waters complained of in the declaration as if it had such effect, or else the plea merely justifies the draining off what water had been forced over the banks and sides, and out of the natural channel and courses of the said rivers, &c. If this be all, however justifiable, it does not answer the declaration nor what the plea in the introductory recital undertook to answer, because they included a diversion of the water from and out of the said river, &c.

It may, however, be said that the purpose alleged in the plea for draining and carrying off the water sufficiently shews, that the combined effect of the whole, i. e., the penning back, raising and forcing over the banks and sides, and out of the natural channels and courses, was to injure the defendant by flooding other parts of the said close, to prevent which he was justified in making the trenches, sluices and channels, &c., complained of.

The purpose alleged, if read distributively, would be for the purpose of draining and carrying away from, and off the defendant's close (through which the said rivers, streams, and water-courses passed) divers quantities of the water so wrongfully penned back, raised, and forced over the banks out of the natural channel and courses thereof, though this would perhaps be a forced construction; then it adds, and to prevent the water from damaging and killing the trees, grass, &c., without specifying whether it was done by the water that had been forced over the banks and sides, or also by water that was forced out of the natural channels and courses by percolation and oozing or otherwise than by being forced over.

It may be, however, intended that in whatever way occasioned, the effect of the penning back and raising was to force the water over the banks or sides, and out of the natural channels and courses. In ordinary understanding, the whole of the latter passage would be taken as descriptive of the one effect, i. e., that the effect of forcing over the banks or sides was to force the water out of the natural channels and courses, although it may be strictly susceptible of a more enlarged meaning and application.

For the purposes assigned, the defendant justifies making the cuts, &c., of which the plaintiff complains, and thereby diverting divers quantities of water so fenned back, raised, and forced over, &c. It does not say, "and no more than was penned back," or than was necessary to abate the nuisance inflicted upon the defendant, otherwise than by saying that divers quantities of water were for the purposes aforesaid necessarily diverted, yet omitting to say that no more was diverted than was necessary. It may perhaps be sufficient to compel the plaintiff to new assign excess, if there was any.

Nevertheless the plea seems bad in this respect, that it undertakes to justify the second count, and yet does not answer that part of it which complains of the defendant's cuts and trenches, &c., causing the waters to break and burst through the bank or side of the stream in that count

mentioned; or that the effect thereof did not occasion more of the water to be diverted than was necessary to abate the nuisance alleged by the defendant, or that there was no excess. I think, therefore, that the second count is not sufficiently answered by the plea, as will be seen by separating that count from the rest, and applying the plea to it, when it will be perceived that the breaking and bursting of the banks or sides, and the consequences thereof, are not sufficiently answered.

As to the last ground of demurrer, that the plea admits the grievances in the declaration mentioned, being a confession and avoidance; it should of course admit the cutting channels, &c., and diverting the water as alleged. It is open to the objection that it also recites the subject matter about to be answered by the plea, as to the 1st, 3rd and 5th counts, as wrongful and unjust, and concludes by admitting the diversion of divers quantities of the water so penned back, &c., that otherwise would have run and flowed to the mill, close and premises of the plaintiff.

It may be also observed, that although the plaintiff is only charged with continuing the obstruction complained of by the defendant, he does not aver a request to remove it, or notice of its injurious effect to the defendant.

As to the main question in this case, it is not raised as a ground of demurrer; that is, whether if the plaintiff occasioned a nuisance to the defendant by penning back and raising the water on his close, he can justify abating such nuisance within his own close by draining off from the stream or water-course such quantity of the water so penned back as may be necessary to relieve himself from such nuisance, not reducing it below the natural level of the stream.

If the defendant could justify entering the plaintiff's close, and demolishing the dam and other obstructions, so as to let the water escape freely iu its natural channel, I do not see how the plaintiff can complain of his accomplishing the same thing by diverting the excess of water caused by such dam, &c., by draining it off within his own close. It is not justifying one nuisance by another, but the defendant relieving himself from a nuisance committed on him by the plaintiff, and as to the consequential injury to the plaintiff, and the argument that he would be abridged of his natural right, the answer would be, that he refused to receive and enjoy the water in its natural flow, but stopped and threw it back on the defendant; that although entitled to all the water in its natural course, still the plaintiff had no right to obstruct it so as to use it when, and as he pleased; and at all events, that no less damage was done to the plaintiff by draining off the water through the plaintiff's close, than would be done by breaking down the plaintiff's dam.

DRAPER, J.—It appears to me, the acts of trespass stated in the count to which the justification is pleaded, are not covered by the excuse assigned. That the plea extends to a justification of lowering the natural banks and sides of the river, so that the waters which would otherwise have been confined by them, and have flowed between and within those banks, are drawn off into an artificial channel, and wholly diverted from the plaintiff's close and mill, for which (a manifestly wrongful act per se.) no other excuse is given, than that by reason of plaintiff's dam some waters had overflowed the natural banks, and so injured defendant's land.

If such be the effect of the plea—and it be a justification—it would, as seems to me, equally extend to a diversion of the whole stream as to a diversion of any part of it; for the argument is this—the water was stopped by the plaintiff's dam, and overflowed its natural banks to the defendant's injury, wherefore, the defendant diverted the entire river from its natural channel, so that no part of it could reach plaintiff's dam, be penned back by it, and thus injure defendant; and that because some injury by overflowing resulted to defendant from the plaintiff's dam, he can justify entirely depriving him of the water.

It is true the plea does not in terms go this length, but if good to the extent to which it is now pleaded as a justification, I do not at present see where the distinction is to be drawn which would not carry to the full extent I have suggested.

The question would have been different if this justification had been limited to the diversion of the water, wrongfully overflowing defendant's land, as in Drewett v. Sheard—7 C. & P. 465. But as it is, the right claimed by the defendant to redress himself extends beyond the wrong he complains of, amounting to a claim of right to do any undefined extent of injury to the plaintiff, instead of only as much as the previous wrongful act of the plaintiff made indispensable. In effect, the plea confesses all the wrong for which the plaintiff sues, and then avoids only a part of it.—See Foulkes v. Scarpe, 4 M. & Gr. 126.

McLEAN, J., concurs.

Per Cur.-Judgment for plaintiff on the demurrer.

EWART v. Bowes.

In declaring on a special agreement—quære, what must be averred in the declaration to have been done? or what may be left to be set up as matter of defence in the plea, if it has not been done? Semble, that the instention of the parties, to be reasonably collected from the whole instrument, must govern.

Declaration: that the plaintiff, defendant, and Hall, were partners previous to 30th November, 1847, as merchants, and dissolved 30th November, 1847-that it was agreed between them, that the plaintiff should have stock, books of account, notes, bills, debts, &c., except certain ones, and the plaintiff should collect the same in partnership name or otherwise, in consequence whereof the plaintiff gave three notes. drawn by himself, endorsed by Strange and Ewart the elder, for 22171. 10s. 4d., each payable at six, nine, and twelve months, from 1st December, 1846-and that the plaintiff should pay debts due by co-partnership, and that if any notes, bills, or open accounts, belonging to partnership, should be over due, and if the plaintift should deem the same hazardous, there should be made a deduction from the said third note of five-eighths of the amount of all such notes, bills of account, &c., overdue and unpaid, and deemed hazardous-that as soon as any money should be collected on such notes, bills, accounts, &c., five-eighths of the amount collected should be repaid to the defendant by the plaintiff. Whereas the partnership had sold goods to Angus before dissolution, and Angus owed for the same at the time of the dissolution-that

Ritchey guaranteed the payment for Angus in consequence, &c., giving leave to the partnership to give time, &c., to Angus-that it was agreed by the plaintiff, and the defendant, and Hall, that if after the time of closing the account of the said Angus, the said Ritchey and Angus should not have paid sufficient to cover the amount due by said Angus at the time of making the agreement between the plaintiff and defendant and Hall-that then the defendant and Hall should bear five eighths risk of the loss which should be deducted from the said third note—and that all notes held by the co-partnership should be renewed, &c., according to the agreement with parties thereto-that the same should be dealt with as agreed by the plaintiff and defendant and Hall. It was also agreed, that Hughes', Cottingham's and White's debts should be collected for the defendant's use—and the plaintiff saith that on the 30th November, 1846, the defendant undertook to perform his part of the agreement, in consequence of the plaintiff's performing his part of it—that afterwards, &c., the plaintiff gave to the defendant and Hall the three notes, &c., -and the said third note, before it became due, was endorsed by the defendant and Hall to the Commercial Bank, on the day when it was due (4th December, 1847) there were overdue and unpaid accounts of the co-partnership, amounting to 1681. 18s. 6d., of which the defendant, &c., had notice, and though five eighths of the said account was 1081. 11s. $6\frac{3}{4}d$.—and though the defendant had notice, &c., yet the plaintiff was obliged to pay, and did pay the said third note without deduction, &c .- that Angus's account was closed on 10th May, 1847, and he had not paid sufficient then to cover the amount due, as aforesaid, and there was due on it 1095l. 2s. 11d-and though at the time when the said third note was due, there was still due on Angus's account 5411. 8s. 6d., of which the defendant and Hall had notice—and though five-eighths of such balance was 337l. 2s, 8d., yet the bank wholly refused to allow it-yet the defendant and Hall have not, nor hath either of them accounted to the plaintiff for the proportion of five-eighths of money due by Angus aforesaid.

Demurrer.

rst. Because the agreement was not averred to be in writing, and not having to be performed within a year, could not be relied on, &c.

andly, that it did not appear if the first two notes of the plaintiff were paid or not.

3rdly, and for all that appeared they were not paid, in consequence of which the plaintiff had monies of the defendants in his hands when the third note became due sufficient to cover the defendant's debt.

4thly, that it was not averred, that between the payment of the said third note and the commencement of this suit, all the accounts were not paid, and still continued hazardous.

5thly, that it was averred in the declaration, that R. Angus owed the co-partnership a large sum, &c., between the 10th December, 1847, and the dissolution whereas the dissolution of the co-partnership took place 30th November, 1846.

6thly, the agreement with Ritchey set out, was liable to the same objection.

7thly, the declaration was ambiguous, and no proper issue could be taken on it—it contained no breach of the agreement set out.

8thly, it was uncertain if the defendant was charged with a breach of promise or with fraudulently endorsing the note.

9thly, it was argumentatively averred that the defendant did not keep

his promise, &c.

Crooks in support of the demurrer.

Ewart contra.

ROBINSON, C. J., delivered the judgment of the court.

I take it for granted, that the promissory notes said in the pleadings to have been given by Ewart, payable to Bowes, were in their form negotiable, though it is not stated in the declaration either that they were to be made negotiable, or that those that were given were such.

Of course if they were not, then the cause of complaint could not have happened, for the Commercial Bank could then only have collected them by suing them in Bowes' name, and any defence could be advanced total or partial, which could have been advanced against him, if he were suing for his own benefit.

But no objection was taken on that ground, and perhaps the stating the notes to be endorsed notes, and the providing that they should be endorsed, sufficiently implies that they were, and were to be negotiable.

With respect to the first breach, we are all of opinion, that the demurrer is not entitled to prevail; the first objection referring to the Statute of Frauds, was given up on the argument.

As to the second objection, we consider that if any deduction had been made out of the first or second notes, as it is suggested might possibly have been the case, or if the parties were still in time to claim a deduction from them, it would have been a defence to be brought out by plea of the defendant.

The parties did not contemplate that mode of making the abatement, but expressly provided for the adjustment by an abatement from the amount of the last note.

So also the third objection points, we think, to what might have been pleaded as a mater of defence, if the facts would have supported it, namely, that the persons whose debts the plaintiff deemed hazardous, may have paid their debts between the time of paying up the third note and the commencement of this suit. If that had been done, however, there would still have been a right of action on account of the plaintiff having been unnecessarily obliged in the mean time to take up the note in full.

The only other objection which is applicable to the first breach is, that which applies also to the second breach, namely, that the declaration should have charged that the defendant and Hall would not deduct, &c., be cause the agreement was, that they would deduct, and that it should not have been laid as a breach of the covenant that the Commercial Bank would not deduct; and that indeed it is uncertain whether the declaration should be treated as intended to be in assumpsit upon the breach of contract, or in case for wrongfully transferring the notes to parties who would not consent to the deduction.

There is an error, however, in assuming the agreement to be that the defendant and Hall would make the deduction, for the contract is, that a deduction shall be made from the third note: the defendants in broad terms covenant, that the plaintiff shall at all events have the benefit of the abatement which they might have ensured by making only a con-

ditional transfer of the note, or by keeping it in their own hands; or they might legally undertake for the indorsee that he would consent, as any person may, if he will, bind himself, that a stranger shall do a certain act.

Upon the second breach we have had a good deal of doubt. It may seem easy enough to understand what the parties might have intended to stipulate for, in regard to the account with Angus, but we must look at the manner in which they have expressed themselves, and it is that which in such cases generally gives rise to any difficulty, for either what may have been meant, is not sufficiently stated; or what is worse, it is sometimes so expressed as to favour a construction varying from the real intention.

It seems to have been contemplated, that the defendant was to continue in business after the dissolution, and might in his discretion continue his dealing with Angus; and might also, when he pleased, use the discretion which the firm had been invested with, by their agreement with Ritchie, of closing the account with him at any time; in which case I take it, that the taking his notes at six, nine, and twelve months for the balance that might be then due to the firm, for goods sold before the dissolution, was not to be a matter of choice with the plaintiff; nor any influence to which the assent of any other party was necessary, as in the case of extension of time to a principal beyond the original credit agreed upon, which will discharge the surety; but the account was absolutely to be closed in that way, for it was only on the condition that Angus should have six, nine, and twelve months, to pay off such balance, and should not be brought up suddenly, that Richie, according to the statement of the transaction, agreed to become responsible for him.

Then when the account should be thus closed (or rather I should suppose upon the dissolution which in effect terminated the dealings of the firm) the notes of Angus were to be taken at six, nine, and twelve months for the balance due the firm, for which alone Ritchie could be held liable; all payments made by him, as well after the dissolution as before, being first credited.

The declaration avers, that on thus settling the account, there remained a certain sum due, of which a certain part was paid before the last of the notes given by the plaintiff and defendant became due, leaving a balance of which the five-eights amounted to 339l. 2s. 1od., and the complaint is, that the Commercial Bank, to whom the last note was transferred, would not allow that 339l. 2s. 11d. to be deducted from it, but that the plaintiff was compelled to pay that note in full, contrary to the agreement made on the dissolution of the partnership.

I confess I do not quite understand what is meant by the stipulation that if it should turn out, when Angus's account was closed, that a balance remained due to the firm after allowing all payments, the defendant and "Hall should bear the proportion of five-eighths of the risk of loss."

It is not said of this debt, that the plaintiff "deemed it hazardous," or that there was in fact any risk of loss both as regarded Angus, and his surety Ritchie.

It seems to be assumed that the moment the balance was struck, it became a sum of which the plaintiff might say that there was a risk of loss, and so at once withhold it; at least till the event was ascertained, and certainly in one sense there is a risk of loss upon every debt till it is actually paid, for no man can tell what reverses may overtake the debtor.

I think it not unreasonable so to construe the agreement, as it is set out, and I do not know how else we are to give it an intelligible meaning, without adding something to it that we are not authorized to add.

The parties, I assume, meant that whatever debt of Angus's to the firm, should be left unpaid, when his continued dealings with the plaintiff might come to an end, the plaintiff should not be obliged to pay up his last note in full, so long as such debt (which might not be eventually received) should be standing out, but that such account should be kept in hand by the plaintiff to be accounted for from time to time (as in the case of other debts withheld) whenever they might be received; and that if before the account with Angus should be closed, the third note should have been paid, then the defendant should otherwise account for the amount as he undertakes to do; or rather he undertakes "to account for the five-eighths of "the risk of loss," which does not carry to my mind any very clear meaning. Reading the agreement as I have explained it, I see no objection to the declaration.

As to the grounds assigned on account of the dealings with Angus being continued after the dissolution, and of Ritchie not being liable for the goods so sold, undoubtedly he is not. But this is not an action charging Ritchie, and there is no reason for raising that question. The declaration adheres to the agreement set out, in that respect. It is only of the debt due to the firm, that the amount is averred after all payments made by Angus had been deducted; and of course the partners when they were separating, could make what agreement they chose among themselves respecting that.

The contract stated is, that the defendant undertook, that the balance being ascertained, which was due to the firm, five-eighths of the risk of loss should be borne by him, and that it should be either deducted from the third note, or that the defendant would otherwise account for it. The breach is, that neither of these things has been done, which the defendant promised should be done.

I think several of the causes of demurrer assigned, are founded on a misconception of the agreement, and that the plaintiff is entitled to judgment on the demurrer.

Per Cur.-Judgment for the plaintiff on demurrer.

JUDGMENTS DELIVERED ON TUESDAY, AUGUST 22, 1848.

Present—The Hon. J. B. Robinson, C. J.
The Hon. Mr. Justice Macaulay.
The Hon. Mr. Justice Draper.

The Hon. Mr. Justice McLean, having been sitting in the Practice Court during the argument, gave no judgments.

CONDY V. MOFFATT.

Appearance by the plaintiff for the defendant under the statute must be filed before the end of the succeeding term, after the process is returnable.

The question in this case was, whether a plaintiff could enter appearance under the statute for a defendant, after the end of the second term.

The plaintiff's attorney contended that he might at any time within four terms.

In this case, appearance was not entered till after the end of the third term.

The rule nisi was to set aside common bail, and all proceedings had thereon for irregularity, on account of the common bail having been filed and entered too late.

Process issued on the 16th April, 1847, returnable the last day of Easter term then next, and was served on the 21st June, 1847. The declaration was filed on the 24th March, 1848, common bail having been filed same day by plaintiff for defendant according to the statute. Copy of declaration served 27th March; and on 3rd April, 1848, the defendant served the plaintiffs with notice of intention to move for the irregularity.

The defendant employed an attorney, on Saturday, 1st April, who, on Monday, 3rd of April, served the notice of intention to move.

- G. A. Phillpotts supported the rule. The plaintiff cannot file common bail for the defendant after the second term, and here it was entered after the end of the third term. He cited Forrester v. Graham, in this court, Hil. T. 2 Wm. IV.; U. C. R. Old Series, 369; 5 Dowl. 662; 2 T. R. 719; 10 B. & C. 457; 1 Dowl. 676; 1 C. & M. 350.
- A. Wilson shewed cause, that this being an action against a Justice of the Peace, it would be too late to institute another suit, and that the plaintiff would have no remedy unless he could still proceed in this.

ROBINSON, C. J., delivered the judgment of the court.

We consider that we are bound by the practice in England, in the King's Bench, as it was before the Uniformity of Process Act was passed, and by our own practice, which was in accordance with it, and which required that common bail should be filed by the plaintiff for the defendant, under the statute, before the end of the second term. Here it was not filed till three terms had elapsed.

The defendant gave prompt notice of his intention to move, and is entitled to have his rule made absolute.—2 T. R. 119; 10 B. & C. 457; 5 Dowl. 662; 7 T. R. 216; Drew v, Baly, E. T. 3 Vic.

Per Cur.-Rule absolute.

DAY V. HAGERMAN.

Where A. having been trued for feloniously shooting at B., and acquitted, was afterwards sued in trespass for the same act, and the jury gave a verdict for the defendant,—though the trespass was proved, the court under the circumstances declined granting a new trial.

This was an action of trespass brought against the defendant for discharging a gun at the plaintiff, loaded with powder and shot, by which the the plaintiff was wounded in many parts of his body.

Plea: not guilty.

The defendant is a farmer, living in the township of Hamilton. In the spring of 1847, he was making sugar, in his sugar bush, and going into the bush after dark on a Sunday evening, he saw this plaintiff and two other young men, sons of persons living near him, sitting on a log in his sugar camp.

It appeared that defendant had been told they were there meddling with his sugar, and he borrowed a gun at a neighbour's house, and went there in consequence; when he got there, they were sitting on a log, not doing anything at the moment, but they had hung a second kettle on the fire, and had made up the fire, and were boiling some sap, intending, as the defendant might naturally believe, to continue there till they had made what sugar they wanted.

They had been there two or three hours before the defendant went there. Seeing what they were about, the defendant, without any warning to them, fired at them as they sat on the log, being about thirty or thirty-five yards distance from them; the shot hit this plaintiff in many parts of his body, and in his legs, arms, face, &c. The surgeon who attended him, swore that about twenty-six shot had struck him, some had penetrated a good way, carrying pieces of his woolen dress with them, which aggravated the inconvenience arising from the wound. The plaintiff was disabled some days from working, and suffered much pain; many shot were extracted, some of them had gone very near inflicting permanent and probably fatal injury, but it fortunately happened that no such injury was suffered, and the plaintiff was not in any way disfigured. The surgeon charged 2l, tor his attendance.

It was proved that the defendant had at the previous assizes been tried for feloniously shooting at the plaintift on this occasion, and was acquitted. The defendant gave no other evidence.

The Chief Justice, who tried the cause, directed the jury that all they had to consider was, what damages it would be proper to give to the plaintiffs under such circumstances, and left the case to them with such observations as the evidence seemed to call for, in that view only.

They were two or three hours out, and returned with a verdict for the defendant.

On the following day another action was tried, which another of the

young men had brought against this defendant, for a similar injury received on the same occasion; he had received only two or three shot, one of which was still in him. The jury gave 1s. damages. None of the jury who sat in the former case were allowed to be impanelled in the latter.

H. J. Boulton, Q. C., moved for a new trial on the evidence, He relied upon the verdict being so clearly against evidence, that it must as a matter of right, be set aside.

Blake, Sol. Gen., shewed cause, contending that the verdict was in accordance with the justice of the case, as they had by their own misconduct provoked the act.

ROBINSON, C. J., delivered the judgment of the court.

It appeared very clearly, that the plaintiff and those in company with him, were taking an unwarrantable liberty with the defendant's property, in the night time, when it could not be easily protected, and on a Sunday night, when it might be supposed it would be safe from such depredations. The trespass was not an involuntary one proceeding from negligence or mistake; nor was it an act done when the party was scarcely conscious that he was trespassing, such as walking through a man's wood, or his pasture, to which it might be supposed there would be no objection. The owner seeing the plaintiff in the commission of the act was naturally provoked by it, and allowed his resentment to carry him far beyond the proper bounds, (supposing all the plaintiff's evidence to be true), to an extent indeed very dangerous, both to the plaintiff and to himself; for if some of the shot had touched a vital part, as it might have done, the defendant might have been charged with murder, and I will not say that he ought not to have been convicted.

Death did not, however, ensue, very fortunately; but the defendant was upon the complaint of the plaintiff, put upon his trial for a felony, in shooting at him maliciously. He stood his trial for that, and was acquitted, and such acquittal is by law final, and cannot be questioned.

He then follows up the criminal prosecution by a civil action, and his case being heard by another jury, they have found a verdict against the plaintiff. There is no point of law contested in this action; no complaint that the jury were misdirected, or that the trial took place under any disadvantage.

The plaintiff asks us to relieve him against the act of the jury, in refusing to give him damages.

When a new trial is applied for on such grounds, it is an application to the equitable interposition of the court, and the question is, whether, when the plaintiff has sustained no permanent injury, it is incumbent on us to assist in making the alleged trespass of the defendant, provoked by the plaintiff's own wrongful act, the means of putting money into the plaintiff's pocket. Much, I think, may be said against that. The plaintiff does not stand on favourable ground in a court of justice, having provoked the defendant to the rash act, by his own deliberate misconduct. It must always be discretionary in the court in such cases to allow the verdict to stand, or not, on a view of all the circumstances. And I think in the present case, we shall do better to let the matter rest where it is.

If a person should deliberately turn his cattle into his neighbour's

grain, and his neighbor seeing him do it should fire at the cattle and kill one of them, he would do an act not justifiable; but if the party who gave the provocation should bring trespass for shooting the animal, and the jury should find a verdict against him, it would not follow that the court would grant him a new trial. If the jury in this case had given trifling damages, we should not have interposed in order to assist the plaintiff in getting larger damages; and though it is quite discretionary, we think it the more sound exercise of discretion not to interfere under all the circumstances.

Per Cur.-Rule discharged.

DOE DEM. PHILLPOTTS ET AL. V. CROUCH ET AL.

A, contracts to sell B. certain land for a sum of money, to be paid by annual instalments, and the defendant went into possession under B. upon some understanding or condition, not explained at the trial; default was made in the payment to A.—Held per Cur. that A. could bring ejectment against the defendant without notice or demand of possession.

Ejectment for Nos. 2, 3, and 4, 3rd concession of Grantham.

At the trial the first demise was abandoned. It was proved, that by an agreement under seal, dated 8th July, 1844, Alexander Dunlop agreed to sell, and one Gibbs agreed to purchase these lots "for the "sum of 1200l., payment to be made as follows, 250l. at the signing of "this agreement, and the balance 950l., in six equal annual instalments. "on the 1st day of June in each year, with interest, at six per cent. " per annum on the balance remaining due when each payment is made." "It is further agreed, that until default be made in payment aforesaid, "the party of the second part, his heirs and assigns, shall enter into ' possession of the above lands, and cultivate the same, subject never-"theless to impeachment for voluntary or permissive waste;" that the defendant Crouch, admitted he had an assignment to defendants from Gibbs. of this agreement, made before May, 1846; and that Crouch also admitted that Dunlop's agent had asked him before this action was brought, to pay the money due or give up the property, and that neither had been done.

The witness stated he had demanded possession of Crouch in Niagara, as he believed, two years ago "this summer." The demise was laid on 10th July, 10th Victoria.

The only question left to the jury was, whether the demand of possession was made prior to the demise laid—they found for defendant.

Philpotts obtained a rule nisi, to set aside the verdict for misdirection, on the ground that no demand of possession was necessary.

Eccles shewed cause, contending there must be default in the whole sum not in any particular instalment, to enable plaintiff to recover, at least without demand: I U. C. R. 310; 2 U. C. R. 153; I Dougl. 282; 4 Bing. 446; 5 Bing. 431; 9 L. Jl. Exch. 38,

Robinson, C. J., delivered the judgment of the court.

The defendant being in possession, not under the lessor of the plaintiff, Dunlop, by any immediate privity with him, but as assignee, or upon some agreement or understanding with Gibbs, to whom Dunlop had agreed to sell the estate upon certain conditions, they can be in no more favorable position for retaining possession against the lessor of the plaintiff, than Gibbs himself would have been, if he had made no assignment of his interest.

Then if Gibbs had continued in possession, having entered under his written contract, which was produced, and proved on the trial, the fact would have been, that having a right to enter, and to possess the land "until default should be made in payment," he would have been holding the possession against the true owner on the day of the demise laid, notwithstanding he had made default in payment.

The contract bound him to pay 1581. 6s. 8d., and interest, on the 1st June, 1845, and a like sum on the 1st day of June in each of the next five years.

It was not attempted to shew that such payment had been made, and we have often had occasion to determine that under such circumstances the owner of the land may bring ejectment without demanding possession.

Gibbs or his assignee can stand in no better situation, after default made in their contract, than a mortgagor or an overholding tenant,—They must have known that after the day when the money was to have been paid, their right of possession ceased, and that they were only tenants at sufferance.

Per Cur.—Rule discharged.

CORBETT, SHERIFF, v. LAKE.

Where one of the bail for a debtor admitted to the limits, hearing of the debtor's escape, paid to the sheriff the amount of debt and costs for which he was imprisoned, exclusive of sheriff's own fees, and the sheriff nevertheless sued the other of the obligors in the limits bond, in order to recover from him the amount of costs in an action which the plaintiff in the original action had brought against the sheriff.—Held, per Cur., that after the receipt by the sheriff of the money paid by the other of the bail, he could not recover for those costs, since he ought to have paid over the money and not defended the action, nor allowed it to proceed.

Debt on bond.

Judgment by nil dicit, and breach suggested under the statute, 9 Wm. III, ch. 11.

One Howard had been imprisoned on a ca. sa. from the Queen's Benchat the suit of one Prout, indorsed for 14l. 15s., besides sheriff's fees, and defendant had become bail for the limits.

Howard departed from the limits, leaving the debt unsatisfied.

The plaintiff proved that he had arrested and imprisoned Howard; that his fees amounted to 21. 12s. 3d.; and that his deputy afterwards met Howard in the country, and asked him how he came to leave the limits? His answer was, that the bail were good; and he begged the officer not to mention that he had seen him.

It was then proved that Prout had sued the sheriff on the bail-bond, &c. and recovered a judgment for debt and costs, 28l. 3s. 1od., including 1l 13s. 6d., sheriff's fees; and that the sheriff paid to his own attorney 3l. 14s 2d., costs of the defence.

On the other hand, it was admitted at the trial, that before the action was brought against the sheriff, the other obligor in the bond for the

limits, being made aware of the debtor's escape, had paid to the sheriff 15l. in consequence, being 5l. over the sum endorsed on the ca. sa., excluding the sheriff's fees on that process; and that the sheriff had instructed Prout's attorney in consequence to draw on him for the money.

The Chief Justice, who tried the cause, held that under these circumstances the sheriff could only recover for his fees (2l, 12s. 3d.) unpaid on the ca. sa., less 5s. paid into his hands by one of the bail above the amount of the debt and costs against Howard; and a verdict was taken for that sum, reserving leave for the plaintiff to move to add the costs proved to have been paid by the sheriff in Prout's action against him, if it should be thought that he had any claim for them, and a rule nisi was granted for that purpose.

Fitzgerald shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

I believe my brothers consider, as I did at the trial, that the plaintiff could not be allowed under the facts of the, case to recover for the costs which he had been made to pay in the action by Prout against him, because having received from one of the bail 15l., when the ca. sa. was only endorsed for 14l. 15s., he ought not to have allowed the action against himself to proceed, but should have paid the money over, and so left no occasion for a suit against which he knew he had no defence.

In addition to this, when we look at the record in this case, we find that in the breach suggested, nothing whatever is alleged respecting the suit of Prout and the costs of that suit, and it would therefore be impossible at any rate to allow the plaintiff to recover for what he had not claimed.

Per Cur.—Rule discharged.

DOE WILKS V. MASSECAR.

Where a verdict was given for the defendant, as it appeared to the court manifestly against evidence, and in support of an assignment impeached as fraudulent—the court gave a new trial on payment of costs.

Ejectment for lot No. 20, in the 8th concession of Windham, now in occupation of Warren Massecar, as tenant to the defendant.

At the trial, a lease of these premises from the Canada Company, dated 2nd March, 1843, to Abraham Massecar, was admitted, and an assignment of that lease from A. Masscear to Henry Massecar, for a consideration of 5l., dated 14th June, 1845. The plaintiff then produced an exemplification of a judgment in B. R., against Henry Massecar at the suit of the lessor of the plaintiff and others, entered the 12th June, 1846, in assumpsit for 216l. 17s. 7d., damages and costs, and a fi. fa. against the goods of Henry Massecar founded thereon, tested the 8th June, 1846, and returnable the first of Trinity Term then next, on which the sheriff returned a levy of 101l. 12s. 6d.; and a sheriff's deed was proved, dated the 24th August, 1846, conveying the premises to the lessor of the plaintiff, by virtue of a sale on this writ of fl. fa. for the sum of 106l. This suit appeared to have commenced by attachment against Henry Massecar, as an absconding debtor; the declaration was entitled the 23rd February, 1846.

It was proved, that about three years before the trial, Henry Massecar was in possession and offered to sell the premises for 1125l., and that after he absconded there was a negotiation with Warren Massecar, thetenant in possession, for a sale, by which the debt to Wilks et al. was to be paid, but it failed; the intended purchaser having notice that an attachment was out against Henry Massecar, would not buy unless his creditors were satisfied.

On the defence was proved an assignment, endorsed on the lease, from the Canada Company, dated 9th August, 1845, from Henry Massecar to Warren Massecar (his son) in consideration of 21. One of the witnesses to this assignment, swore that in September, 1845, he took the lease to Wilks, and told him he was authorized to say he could have the property for the value of it, and pay himself. Warren Massecar was to pay Henry Massecar 1000l. or 1125l. He paid 25l., and gave notes for the balance; that Warren Massecar should pay his (Henry's) debts and endorse it on the notes. Besides the lease, Henry Massecar also sold Warren Massecar his chattel property, oxen, five horses, waggons, harness, with everything belonging to the mill, and was paid 25l. by Warren Massecar on account. Warren had lived on the place with his father, and continued there up to some time in the summer of 1847. Henry Massecar's wife and family lived at the mills six or eight months after he went away. He was not absent long but returned and worked at the mill till the summer or fall of 1846. Debts contracted by Henry Massecar, while in possession of the mill, payable in lumber, were paid after the assignment to Warren Massecar, who has since left the province. No assignment to the defendant was proved, though two letters from the Commissioner of the Canada Company to him dated 3rd and 19th February, 1847, were received by consent, from which it appeared they had refused to acknowledge him as their tenant, and returned to him some small sums he had just before enclosed on account of the rent.

The case was left to the jury on the bona fides of the assignment from Henry to his son Warren Massecar, with a charge indicating the preponderance of evidence against the transaction. The jury found for defendant.

R. P. Crooks obtained a rule for a new trial.

D. B. Read showed cause, and attempted to support the verdict by the evidence; contending that at any rate where a defendant, whose deed was impeached, succeeded on the trial, the court would seldom or never interfere, unless there had been something illegal or wrong in the conduct of the trial. He referred also to the hardship of the lessor of the plaintiff endeavoring to keep for 150l. a property really worth 1000l, and he relied on Doe dem Ausman v. Minthorne, in this court, 3 U. C. R. 428, as shewing that the sheriff's sale in this case was void, because at the time Henry Massecar was in possession, claiming to be the owner.

Crooks in reply.—In Doe dem Ausman v. Minthorne, the facts were very different; there the person in possession was not shewn to hold under any title from the debtor. He conteded that the conduct of the jury was evidently perverse, and such as might entitle him to a new trial without costs; he referred to Kirby v. Lewis, in this court, and to Miller v. Taylor 3 Bing. 109.

ROBINSON, C. J., delivered the judgment of the court.

The evidence in this case is so extremely strong, to lead to the suspicion that the assignment made by Henry Massecar, who absconded from the country, was fraudulent and colourable, that we think the case should undergo another investigation. Although the property has been the subject of other trials, as was observed in the argument, yet the main point in the case, the honesty of the alleged transfer, has never been pronounced upon except on this last occasion.

When one reads the evidence, it is difficult to avoid apprehending that the jury may have been unduly influenced by a reluctance natural enough, to decide that a property said to be worth roool, or more, should pass into the hands of the execution creditor for 150l., which I think was what Mr. Wilks bid for it at the sale: but it should be remembered in these cases, that where at the time of a sheriff's sale the debtor, either himself or through any pretended assignee, sets up a claim and forbids the sale, the effect of that is to deter strangers from bidding, they are afraid of being involved in a law suit, and the consequence is, that unless the creditor will himself bid upon the property against any one that chooses to make a bid, however low, there would be either no sale, or it would go for a nominal sum, and the creditor's legal remedy would be defeated, however groundless the opposition made to the sale might be. The inevitable effect of fraudulent claims being set up is to prejudice the sale; and if upon investigation, the assignment advanced turns out to be worthless, then the consequence is, that by means of its being put forward, the property has fallen into the hands of the creditor, or of some other bidder, for a trifle, when if no such dishonest attempt had been made, it might have sold for its value. I mean only to say, that where there has been any fradulent attempt to set up a pretended sale, this is likely to be the effect, and the debtor has only himself to blame. Whether this has been a case of the kind, is a point which we think requires to be re-considered.

Mr. Read, in support of the verdict, objected that while Warren Massecar was in possession under the assignment, claiming the land as his own, it could not be legally sold under a fi. fa. against Henry Massecar and he referred to the judgment of this court in Doe dem. Ausman v. Minthorne, but there is no similarity in the two cases; there Minthorne was not in possession under any privity with the debtor; here Warren Massecar was in under an assignment from the debtor, who would certainly take no steps to turn him out, if the object was to defeat the execution.

Per Cur.—Rule absolute for a new trial, on payment of costs.

DOVE V. DALBY.

New trial granted under particular circumstances—where the defendant's attorney mistook the place of the cause on the docket, and lost in consequence an opportunity of making a defence.

In this case Bell moved for a new trial, on affidavits setting forth that the defendant was, from an accident, misled as to the place on the docket

on which the case stood, and so that it was tried in his absence; and he filed an affidavit of merits.

Robinson, C. J., delivered the judgment of the court.

It appears here, that by an accident in looking over the list of causes at the assizes, the defendant's attorney was under a wrong impression as to the time when the cause would be tried, and lost in consequence the opportunity of making a defence. It would be dangerous to allow readily, such an excuse for not being prepared, because the plaintiff can do no more than enter his cause properly, and the defendant must at his peril take notice of its place in the docket. We never could tell when such an excuse might be sincerely advanced, and the other party could never disprove it, whatever the truth might be.

We should be unwilling therefore to interfere on such a ground in general; but this is a dispute between a tradesman and a customer, about a sum of no very large amount, and the affidavits filed in regard to the demand, are of that nature that they affect very seriously the character of the parties for integrity, and statements are made which it is very material should be investigated for other reasons than the mere amount of money involved.

We think there should be a new trial, but only on condition of the defendant paying into court, or securing to the satisfaction of the master, the amoun tof the verdict that has been rendered, and the costs of the last trial, by the 10th of September next.

Per Cur.-New trial granted on terms.

CLEMOW, ASSIGNEE OF BLASDELL, A BANKRUPT, V. THE PRINCIPAL OFFICERS OF HER MAJESTY'S ORDNANCE.

The rules of this court of Michaelmas Term, 4 Geo. IV., respecting the service of pleadings and papers in a cause, on an attorney residing out of the district in which the action is brought, apply equally to all districts, and to the attorney for both parties in the suit.

In this case the defendant obtained a rule to shew cause why the service of declaration and demand of plea, and all proceeding since declaration filed, should not be set aside for irregularity with costs, no declaration or demand of plea having been served on the defendants, their attorney or agent; or why the interlocutory judgment, or subsequent proceedings should not be set aside for irregularity on that ground, or on the merits, &c.

The declaration was filed in the Deputy Clerk of the Crown's office, in the district of Dalhousie, 18th April, 1848.

H. Sherwood, Esq., entered appearance as the defendant's attorney.

The action was brought in the district of Dalhousie, and the process issued from the office there.

The defendant's attorney resides in Toronto, and had no known agent in the district of Dalhousie.

The plaintiff's attorney, on the 18th April, 1848, put up in the Deputy Clerk of the Crown's office, in the district of Dalhousie, a copy of the declaration filed, and of demand of plea, and no plea being filed, or served, the plaintiff signed judgment on the 26th April, 1848, for want

of a plea, and on the same day put up in the Deputy Clerk of the Crown's office there, a notice of assessment of damages, and served it on the same day on a gentleman who stated himself to be agent for the defendant's attorney, in this cause.

The assizes at Bytown commenced on the 3rd of May, and no notice was given to the plaintiff's attorney of an intention to move against his proceedings for irregularity, till the 6th May.

Phillpotts in support of the rule. The rule could only have been intended to apply to cases where the attorney resides out of the Home district, and was not meant to enable an attorney in the country to serve an attorney residing in the Home District, by putting up a copy of the paper in the Deputy's office, in the outer district.

Eccles shewed cause, contending that the judgment was regularly signed for want of a plea; the declaration and demand of plea being regularly served under the rule, which was comprehensive in its terms, making no exception with regard to attornies usually residing in the Home District, and where the action is brought in some other district than the Home, and applying as well to pleadings and papers to be served for the one party in the suit, as for the other.

ROBINSON, C. J., delivered the judgment of the court.

If it was competent to plaintiff to proceed in this way, by serving his declaration and demand of plea, by putting the same up in the office, because the defendant's attorney resided in the Home District, where the court sits, and had no general professional agent in the district of Dalhousie, then the question will be, whether the defendant, under the circumstances, should not be let in to plead on the merits.

It is sworn, that the defendant's attorney entered appearance soon after Hilary Term. If that be so, then it was not reasonable in the plaintiff's attorney, instead of sending him the declaration and demand of plea, to delay any proceedings till the 18th April, and then to put up those papers in the office, and sign judgment because no plea was filed in eight days.

If the service of declaration, and demand of plea and notice of assessment was irregular, then the judgment should be set aside without costs.

The question of irregularity turns upon the effect to be given to the rule of this court of Michaelmas, 4 Geo. IV., which provides "that when "the attorney in any cause depending in this court, resides without the "district where the action is brought, all notices and demands, and "other papers, or pleadings to be served on such attorney, shall be "deemed regular by being put up in the crown office, in the district "wherein such action is brought, unless such attorney have a known agent in the same district, in which case, service on the agent shall be "required."

We do not find that any case has been decided in this court on the con struction of this rule, that can apply to the prosent question; none has been cited; nor is it shewn that such a use has ever before been made of the rule as has been made on this occasion.

But on the other hand, we cannot see how we can either confine the operation of the rule of court to cases where the action is brought in the Home District, or to those papers only which require to be served on the defendant. The language of the rule is plain and express, and

clearly embraces all districts, both parties in the suit, and all papers to be served.

But though we cannot hold the proceedings irregular, we have no hesitation in granting the other alternative, and setting aside the judgment and subsequent proceedings on payment of costs; for it was not reasonable in the plaintiff, when he had so loug a time to declare in, to delay it until the latest moment, and then put up his declaration in the district office, when he well knew where the defendant's attorney lived, and that he could not get knowledge of it, and plead in time.

Per Cur.—Rule absolute, on payment of costs.

KETCHUM V. JONES & COTTON.

The several members of a firm being sued as indorsers of a promissory note, one of them was by mistake called Charles Jones, his christian name being William—Held per Cur.—that the variance could occasion no difficulty on the trial, the only question there being as to the identity of the party. The defendants, it they desired to take an exception, should have moved under the Statute 7 Wm. IV., ch. 3, to compel the plaintiff to amend his declaration.

Writ of trial to the District Court of Home District.

The plaintiff declared that one Francis Donnelly, on the 30th November, 1846, made his note, promising to pay to the defendant or order £208s. 9d., for value received, in three months, and that the defendants indorsed the note to plaintiff, and averred non-payment by maker, &c.

The defendants pleaded that they did not indorse the note.

The note produced was made payable to "Jones & Cotton" and indorsed "Jones & Cotton."

It was admitted that the note and interest had been paid since action brought and before trial, but not the costs, wherefore the plaintiff desired to have nominal damages assessed; and the only question arose in consequence of a mistake.

The firm of Jones and Cotton consisted of *William Jones*, and Robert Cotton, the christian name "Charles," was inserted by mistake in the declaration, William being the person intended to be sued; and it was William Jones who gave instruction to the attorney to appear for him.

Ewart, for the plaintiff—contended that the plaintiff was entitled to recover—that before the late statute, the defendants could only have pleaded in abatement for the nuisance. It would have been no ground of defence at the trial, and he cited I Ch. Pl. 266; 15 E. R. 160; I Cr. M. & R.

"Duggan, for the defendant.—The evidence did not support the statement in the declaration that Charles Jones and Robert Cotton endorsed the note—and therefore the plaintiff should have been non-suited.

ROBINSON, C. J., delivered the judgment of the Court.

It is quite clear the postea should go to the plaintiff for is. damages, the debt having been paid since action brought.

All that can be said is, that one of the defendants has been misnamed. That only gave him a right to compel the plaintiff to amend and call him by his right name under our Statute 7 Wm. IV, Chap. 3

Sec. 8, if he thought it worth his while to notice the error, instead of pleading in abatement, which was all he could have done before that statute.

Having appeared and let the mistake pass without notice, all that was to be determined at the trial was, whether the parties actually served (by whatever means they may have been erroneously called,) were the same persons who endorsed the note as payees, and this there is no doubt of, upon the evidence; and the identity is not denied. I Ch. Pl., 265; 15 E. R. 159; 5 Dowl. 332; I Cr. M. & R. 771.

Per Cur.-Postea to the plaintiff, 1s. damages.

FARISH V. ROBERT MCKAY AND JAMES MCKAY.

Under what circumstances an assignment made by a debtor of his goods to one or more of his creditors for the benefit of themselves and others may be upheld as against another creditor who has seized the same goods in execution upon a judgment confessed to him before the assignment.

This is a race between creditors.—William McKay was a merchant trading in Guelph, and became indebted to various persons residing in Hamilton.

The plaintiff Farish it seems was his largest creditor. On the 4th March 1847, an attorney or agent of William McKay, came to Farish and proposed that he should agree to take payment of his debt in instalments of £50 payable every three months; but offered no security. This Farish declined and was then told that as he did not choose to accept that offer, McKay had given a confession of judgment to certain of his creditors, who would proceed and sell his goods.

This alarmed Farish, and he went on the 6th of March, the intervening day being Sunday, to Guelph with his attorney, and prevailed on William McKay to execute the bill of sale on which he now relies.

The cognovit it appears had been given five or six months before, and was given to the defendants in this suit for the amount of a debt due to them, and also for the amount of debts due to some other creditors, omitting only, as it seems, the debt due to Farish, which was by much the largest of any of them.

Why William McKay designed to exclude him was not explained. Farish had no knowledge it seems of the cognovit having been given till the 4th of March, when the proposition was made to him.

On the other hand it was sworn, that the creditors whose debts were covered by the cognovit were apprehensive that Farish intended to make William McKay a bankrupt, and were led in consequence to make the proposition which they did to him, and to act promptly on their confession when they found he would not accede to it.

When Farish and his attorney went in haste to Guelph on the 6th of March, in the hopes of averting what McKay had threatened, they took with them an assignment already prepared, the effect of which would have been to make over all William McKay's effects to three trustees (not those afterwards named in the deed); in other respects the deed was like that afterwards executed, except that it contained no provision for releasing William McKay from the debt due by him.

He objected to this omission, and insisted upon the defendant Robert McKay, one of the cognovit creditors, being made a trustee, and the deed was altered, substituting with his assent Farish and Robert McKay for the three trustees before named, and was then executed.

There was no other evidence ofwhat took place at Guelph before and at the execution, than that of Colin Reid, the attorney who had gone out with Farish to procure the assignment, and who was a subscribing witness to it.

He swore that William McKay executed it in his store at Guelph, and delivered it to Farish, who gave it to him, the witness, and that Farish told William McKay to take possession of the goods "until he could go to Hamilton and see what should be done," that when they got to Hamilton they applied to all the creditors, who declined being parties to it. Robert McKay is a partner of the other defendant James D. McKay, the creditor who took the cognovit for the security of the debts due to themselves, and others, excluding Farish. When he was applied to, he said his partners had gone to Guelph to see William McKay, and that he would not be a party to the deed either as trustee or creditor; prefering as it seems to rely on his judgment.

When Reed and Farish returned to Hamilton, and before seeing Robert McKay, on hearing that James McKay had gone to Guelph, they sent one Grant there with written instructions to take possession of the goods. This was on the 7th of March.

The deed was executed on the 6th, on which day Farish also executed it as a creditor on behalf of his firm, and as an assignee named in the deed, and having before this time become insolvent, his effects had been assigned to two trustees, Young and Cameron, one of whom. Young, executed the assignment on the 7th of March.

No schedule of the goods or effects of any kind was taken on the 6th of March; nor any actual delivery made of the property, further than that the deed was delivered "in the name of all the goods and chattels.

All the creditors, except Farish, refused to execute, and he did not specify the amount of his debt, having not at that time ascertained it.

Grant got to Guelph in the evening of the 7th of March, and found William McKay in possession of the shop and goods, who refused to give them up to him, but insisted on continuing in possession; James McKay was with him, and Grant and William McKay staid there together till the next day, when the sheriff came with the fi. fa. and levied at the suit of these defendants, putting Grant out of the shop.

When the plaintiffs had given this evidence, the defendants' council moved for a nonsuit.

rst. Because the deed was void as being made in contemplation of bank-ruptcy.

and. Because Farish could not execute the deed as a creditor so as to bind the other members of his firm, and that having assigned all his effects, credits, &c., to trustees, he had no longer any interest as a creditor.

3rdly. That it was not shewn that Farish & Co., were creditors of William McKay.

4thly. That the deed of assignment is wholly void and inoperative,

because no debt was set opposite the name of any creditor, as the deed required, and because there had been no actual delivery of the goods, nor any change of possession.

The learned judge over-ruled all these objections at the time, but reserved leave to the defendant to move to enter a verdict upon them.

On the part of the defendants it was proved, that on the 7th March, their attorney having heard in some manner of this assignment being made, went to Mr. Reed and requested to see it, but could get no information respecting it, and in consequence entered up judgment on the cognovit and took out execution.

It was not clearly proved, that James D. McKay heard of the assignment on the 7th March, and went in consequence of that immediately to Guelph.

The defendants wished to call William McKay as a witness, for the purpose of proving that he did not execute the assignment as stated by Reed, that is, that he did not deliver it as a perfect deed, but only signed it conditionally, on the understanding that if Robert McKay would not assent to it, and act as a trustee, it should be cancelled.

The learned judge rejected him, ruling that he could not be brought to contradict the subscribing witness, and disprove the execution of his deed, and it was left to the jury to find whether the cognovit was given in fraud of the plaintiff Farish; 2ndly, whether the assignment was made bona fide for the benefit of all the creditors of William McKay.

They found that both were taken in good faith, and not with any fraudulent intent, and found for the plaintiff,

Cameron, Q. C., moved for a new trial on the leave reserved, and cited 5 Bing. 368; ii A. & E. 561; 2 T. R. 267; i4 E. R. 568.

D. B. Read shewed cause, and cited 9 B. & C. 300; I Vent. 130; 9 C. & P. 507; Shep. T. 157; 2 B. & Al. 551; 3 B. & Ad. 498; 3 M. & A. 571; 2 B. & P. 59; 5 T. R. 255; 9 C. & P. 640; 2 Chit. Rep. 564; I B. & Ald. 183; 2 Salk. 172; 3 C. & P. 338; 14 M. & W. 47; I Esp. 136; 2 Camp. 283; 5 Bing. 388, 372, 377; 3 B. & C. 211.

Robinson, C. J.—This rule takes up the case upon the mere ground of the legal objections reserved at the trial. It is therefore unnecessary to consider whether the debtor who made the bill of sale (Wm. McKay) was or was not a competent witness for the purpose for which the defendants called him, nor what might have been the effect of the evidence which he was expected to give, because the rejection of his evidence is not made a ground of moving against the verdict. Neither are we called upon to consider whether, upon the evidence which was before the jury, they ought not to have found the deed to Farish fraudulent, because the verdict is not complained of as being contrary to evidence in anything which it was the province of the jury to determine upon. It is also clear, I think, that we cannot hold the plaintiff's case defective for want of proof that the deed was delivered, because the subscribing witness to the deed swore it was actually and formally delivered.

The defendant's counsel, in simply reverting to those legal exceptions which he took at the trial in the first instance, as grounds of non-suit, has no doubt thought that they plainly entitled him to prevail, and that he could safely rely upon them. I confess, my own impression, speak-

ing at present without reference to adjudged cases, was strong to the same effect. We must now consider, however, what ground there is, on which the assignment can be held by us, without the aid of any finding of the jury, to be clearly void.

With respect to the deed being void, as being made in contemplation of bankruptcy, that question did not appear to be urged with confidence in the argument. We could not on this motion give effect to it, because we cannot put ourselves in the place of the jury; the fact, that it was made in contemplation of bankruptcy, requires to be proved; the objection is not a legal one separate from the facts, but it is clear that it could not, at any rate, be urged with success.

I agree with my brothers in thinking that there is no clear ground on which we could hold the deed void, merely on account of the execution by Farish not being such as could bind him as one of McKay's creditors; because if we consider, that having assigned his property and effects, including the debts due to him to assignees, he was not therefore in a situation to execute as a creditor, not being able to release, still there is the fact that one of his trustees executed the deed on behalf of his estate, being authorised by the terms of the trust deed to act either severally or in connection with the other trustee; and besides, as neither Farish nor his trustee has executed the deed perfectly, the case at last, on that point, resolves itself into the objection, that no creditor has in fact executed according to the intention of the deed, which objection I shall presently advert to.

That there had been no actual delivery of the goods, nor any change of possession, are not exceptions that we could rely on in bane, as mere legal exceptions, because there was evidence that the goods were in fact delivered over in form at the time of the execution of the deed, a ceremony, however, which would not be necessary; and as to the debtor's continuing in possession for two or three days, as he was before, it was a fact which did not of itself shew the assignment to be necessarily void as being fraudulent, but it was a fact to be considered by the jury with the other circumstances of the case; strong evidence of fraud, a most suspicious circumstance, but still capable of explanation. Looking at it with all the attendant circumstances, I should, think, as one of the jury, have made up my mind without much difficulty, to treat the assignment as fraudulent, or at least as inoperative and void; for when I saw that William McKay, said to be a relation of the debtor, and one of his creditors, was at his express instance inserted as a trustee; that it was not yet known whether he would consent to such an arrangement or not; that the assignment to Farish was undoing in a measure, and without reference to him, what Wiliam McKay had done, and legally done in Robert McKay's favour, when he gave the confession of judgment; that Farish having got the assignment, departed, leaving William McKay still in uncontrolled possession of the shop of goods, saying that he would do so until he went to Hamilton to see what should be done; that Robert McKay wholly refused to be a party to the assignment as trustee or otherwise; that William McKay in consequence refused when he found this, to allow any one to take possession of the goods; but maintained possession himself; and that things were in this state when the sher 's officer came with the fi. fa.; I think I should have

had little difficulty in considering that as against the execution creditors the assignment was not entitled to prevail; for I should have had little or no doubt from the whole complexion of the case, that the understanding between William McKay and Farish was, that the assignment was not to go into effect unless Robert McKay assented to it, and that it was fraudulent in Farish to attempt to act upon it, and treat it as absolute, when he refused to concur.

But the jury have settled this point, as I have already stated, and it only emains to be considered whether the deed is such that we must say under the facts proved, it could not have the effect of passing the proper ty

ty.

I think it is clear, on the authorities cited in the argument, that the mere fact that one only of the two trustees has accepted the trust and

executed the deed, does not prevent its taking effect.

Then it is equally clear, I think, that it was competent to William McKay to make an arrangement such as the deed expresses, though it might operate to the prejudice of the creditors for whose debts he had confessed judgment; and indeed, though it was the express object of it to prevent their having a prior claim. The cases of Meux v, Howell, 4 E. R. I; Pickstock v. Lister, 3 M. & S. 371; Holbird v. Anderson, 5 T. R. 235; the King v. Watson, 3 Price 6, confirm this. The courts in England have indeed gone great lengths in giving effect (whenever they can possibly uphold them) to arrangements made by a debtor when in falling circumstances, with the view of securing to all his creditors, or to the great body of his creditors, satisfaction equally out of his property to the exclusion of some one or more of his creditors, who but for such an arrangement, would gain priority and obtain satisfaction for their own debts first.

We cannot, sitting here as judges, hold that this arrangement was made otherwise than bona fide, for it is for the jury and not for us, to pronounce upon the motives and intentions of parties. The question for us is, the mere legal effect of the deed, in the state in which it was when the fi. fa. came into the sheriff's hands.

My brothers, I believe, consider that although there was at that time no party of the third part, that is no creditor whose debt was stated in the deed, yet that the execution was sufficiently perfect to have the effect of vesting the goods in the trustee, Farish. On that point I have yet great doubts. There are many decisions both of courts of law and equity in England which seem to support that view; but when examined closely, they differ, I think, from the present in some material circumstances, shewing that the future execution of the deed by the parties of the third part, was contemplated; and generally a time is set, within which the creditors are to execute.

The evident intention of this deed was, to make Farish, who was one principal creditor, a trustee, not alone, but jointly with Robert McKay another creditor, who had already a judgment for his debt, and was moreover trustee for others whose debts were included in his confession; to place an unlimited confidence in the two, by transferring to them all the debtor's goods, furniture, debts, &c., enumerating nothing, in trust, to sell them and to pay out of the proceeds not all his creditors, nor all who might thereafter come in and execute, either within a set time, or

at any time, but to pay to all those who were parties of the third part (there being no such parties yet named in the deed nor any provision made respecting their future execution,) the several debts set opposite to their respective names, and all the money that should remain, was to be paid to William McKay himself, the debtor, the expressed consideration of the assignment being, that the parties of the third part thereby released the several debts set opposite their rames.

Now as in fact only one trustee, Farish, would consent to execute, and no other creditor has signed, the result of giving the deed effect will be that one creditor alone gets all the effects into his hands, which, for all that we see, may be five times the amount of his debt, and after paying himself he is to hand over the money that may remain to the debtor, who thus gets the surplus, and may pay no one.

Farish is at the same time trustee, and cestui qui trust; his debt is nowhere stated, he may state it at what he pleases, and thus he and the debtor have the whole disposition of the debtor's effects completely under their controul, tied up from the execution, which they may defeat if they please.

It is true that a court of equity may be restored to, and can controul the trustee, but I have not yet satisfied myself that the law is so helpless that it must suffer an agreement so palpably defective, (without the aid of equity) to take effect. If so, where would have been the safety of creditors in this province during the forty years when we had no court of equity?

I cannot reconcile a decision that this deed had the effect of transferring the goods, considering the state in which it was when the fi. fa. was executed by the sheriff, with the decision in Weeks v. Maillardet, 14 E. R. 568 or with the language of the court in Hudson v. Revell, 5 Bing. 384.

It is true, that in the latter case the Lord Chief Justice, by the judgment which he delivered, was upholding that as a necessary act to perfect the execution of the deed, which on the other side it had been contended was an alteration of it which made it wholly void; but the language which his lordship uses in expressing his opinion, that no creditor can be said to have executed till his debt is stated, where the deed refers to its amount as being stated in the deed, is such as makes me doubt whether we can regard this deed as executed by any creditor, or as being a complete deed for any purpose until some creditor at least has made himself a party to the deed, and has specified the amount of his debt; so that there is one subject, at least, on which the deed can operate, and a consideration by a binding release of some debt, such as seems necessary for supporting the assignment. Referring to the case of Weeks v. Maillardet, 14 E. R. 568, and looking at the contents of this deed. I do not see how I could hold that a deed must be imperfect and inoperative, when it refers to a schedule as being annexed (at the time of execution), because it is shewn that at that moment there was no such schedule annexed, although one was annexed the next day, and yet hold that this deed is at the time of execution complete and operative, which speaks of parties of the third part, and declares it to be the object of the deed to pay them the sums set opposite to their respective names, (not speaking of them as parties who

are to execute, or of the sums as sums to be set opposite to their names) when there is no such party of the third part, with a sum set opposite to his name; not only none such on the day it was executed by parties who by such execution must be understood as referring to what there appears on the face of the deed, but not one such at this moment.

It is my present opinion that the deed, under the circumstances, was not a perfect deed to pass the property on the 8th of March, when the sheriff entered and seized the goods as the goods of the debtor, whom he

then found in actual possession.

At the same time I admit, that I have great difficulty in reconciling that opinion with much that is to be found in the reports of cases; and I am not sure that the opinion of my brothers is not more consistent with authority, for such has been the bearing of the courts of law, to give effect to anything which has a tendency to carry into effect by voluntary arrangement the principle of the bankrupt law, which is an equal distribution, relying on what courts of equity may do in helping on the design, and making all come out justly in the end, that they appear to have been willing to uphold almost anything that can be made to serve that equitable purpose.

The decision of a majority of the court in the present case, will be in accordance with this principle, and may have in the end a more just effect than the application of the goods to the satisfaction of the judgment creditors would have had, for that would have excluded perhaps the principal creditor, whose debt, for some reason not explained, was not included

in the confession.

MACAULEY, J.—I think the bill of sale had the effect at law of passing the right of property from the assignor to the assignee, as between the parties; and if so, the only question is, whether it was fraudulent and void as against creditors; and the jury having found otherwise, I do not think the deed void on the face of it, as imperfect for want of a schedule, the names of creditors, &c.; it is complete to transfer the property in trust for creditors, one creditor at all events has executed it. There are therefore trustees and cestui que trusts, and other creditors may come in if so disposed.

It seems an assignment for the benefit of all the creditors who became parties to the instrument,

At law the right of property passed—and the execution of the trust accepted by one of the trustees, it is in the province of a court of equity to enforce. My doubt is, whether the deed is not void for uncertainty in the third parties.—See B. & A. 672; 3 M. & S. 371; 5 B. & A. 28; 14 M. & W. 47; 9 C. & P. 640; 5 Bing. 368; 5 T. R. 420.

Draper, J.—The only point in this case on which I entertain any serious doubt, was the non-insertion of any debt due to the only creditor who executed the deed of assignment and release. But after hearing the argument, and looking into the authorities, I feel quite clear that the verdict is right. The iury have expressly negatived fraud, and the cases in equity and those at law which have been cited, and to which I would add Wood v. Dixie., 7 Q. B. 892, establish that the property passed to the plaintiff, although there was no schedule of it, nor any actual delivery, and though it was executed by only one trustee, and not withstanding the omission to insert the amount of the plaintiff's debt

opposite to his execution of the deed, or that of the assignee of his estate.

The case of Weeks v. Maillardet, 14 Ea. 568, which was much pressed on us, as well as that of Hudson v. Revell, 5 Bing. 368, are I think, very distinguishable from the present, while Pickstock v. Lister, 3 M. & S. 371; Small v. Inwood, 9 B. & C. 300; Holmes v. Love, 3 B. & C. 242; and West v. Steward, 14 M. & W. 47, taken together, seem to me to lead irresistably to a conclusion in favor of the plaintiff.

It has occurred to me at the last moment, on looking at my notes of the evidence taken at the trial, that very probably the judgment entered against William McKay on *cognovit actionem*, would be open to the objection which the court have just sustained in LeMesurier v. Brondgeest, which would strengthen the plaintiff's claim to our judgment.

ROBINSON, C. J., dissentiente.

Per Cur.-Rule discharged.

PERRY V. GROVER.

When the defendant, instead of demurring to the plaintiff's replication to his second plea—as he intended—demurred to his first plea, so that upon the second plea no issue was joined:—the court set aside the verdict, and allowed both parties to mend their pleadings.

Assumpsit on a promissory note, made by the defendant to one Goslee or order, endorsed to the plaintiff.

and count, on account stated.

and plea, that the defendant made the note, and Goslee endorsed it, for the accommodation of the plaintiff, and without consideration, and that the plaintiff did not hold the note for value.

3rdly, non-assumpsit to the last count.

Simileter to the 1st and 3rd pleas. The plaintiff replied to the 2nd plea, that Goslee endorsed the note in blank, and that before it became due, he, the plaintiff, took it from one James Perry as lawful holder thereof, for good consideration, and this he is ready to verify, &c.

The defendant demurred to this replication (or rather meant to do so), but called it erroneously the plaintiff's replication to the *first* plea of the defendant to the first count, instead of calling it his replication to the defendant's second plea to the first count; and he assigned for cause various grounds, applicable to the replication to the 2nd plea, but having no application to the plaintiff's answer to the 1st plea, which was the mere *similiter* joining issue upon it.

A verdict was taken at Nisi Prius, for the note and interest, and contingent damages were assessed on the demurrer.

In the following term, the defendant moved that judgment be arrested, or that a repleader be awarded, or that the verdict be set aside for irregularity; the award of *venire facias* on the record being to try *the issue* joined only, whereas there were several issues in fact joined on the record.

The *venire* was as well to try the said issue above joined between the parties, as to inquire what damages, &c.

D. B. Read, in support of the rule, cited 9 M. & W. 629; 2 D. & L. 545. Vankoughnet shewed cause, and cited 5 Dowl. 84.

ROBINSON, C. J.—In regard to the first plea, the defendant has put himself on the country, and the plaintiff had entered a *similiter*, as appears by the record; and the same as to the third plea.

On the second plea, which was special, there was, by a slip, no issue regularly taken. That plea concluded with a verification, the plaintiff answered it by a replication setting forth new matter, and concluding with a verification; and the defendant intending to refer to it, but by mistake referring to another replication, or rather to a supposed replication that did not exist, demurs to the plaintiff's replication to his first plea, instead of the second plea, so that in fact upon the second plea, there is no formal conclusion to the contrary, but a plea that the note was made by the defendant, and endorsed by Goslee for the plaintiff's accommodation, a replication that the plaintiff took it from James Perry for value, and not as indorsee of Goslee, as he had stated in his declaration, and offer to prove that fact. So as to that plea, no issue was joined, and the jury were not sworn to try the truth of the plea or replication.

There must be a rule to set aside the verdict, and both parties may be allowed to amend their pleadings. The case relied upon by the plaintiff of Smith v. Smith, 5 Dowl. 84, is clearly not applicable, for there was an issue there, though informally raised by the defendant.

The case of Wordsworth v. Brown, 3 Dowl. 698, is more like the present, except that the irregularity is more palpable here, for there was no issue tendered or joined on the plea now in question. The verdict must be set aside without costs, as no notice was taken of the irregularity, till after the trial, and the parties may apply hereafter to amend their pleadings.

Per Cur. - Verdict set aside without costs.

Brown v. Ross et Al.

The count for demurrage can only authorize a recovery for a sum of money due on an express contract to pay demurrage eo nomine; not a recovery for demurrage for wrongfully detaining the vessel, when nothing had been specified about demurrage.

In this case the only legal question was, whether the plaintiff could recover for demurrage under the general count for demurrage, without proving an express contract to pay for demurrage eo nomine.

ROBINSON, C. J., delivered the judgment of the court.

The evidence given on the second trial, has but little varied the case, and I must say that I retain the same opinion which was expressed after the first trial, that the plaintiff did not shew himself entitled to recover, the same opinion was formed and expressed to the jury, it seems, at the last trial, by the learned judge who presided.

Independently of other considerations arising upon the evidence, especially the plaintiff's settlements with the defendants for the freight, and his submitting them to certain claims for damages upon him for injury to cargo, and for short delivery, and not advancing (so far as the

receipt shews) any claim at that time for detention of the vessel, there is really no count in this declaration on which the plaintiffs could properly sustain the verdict upon the evidence which they gave.

The two special counts state such a contract as was clearly not proved or capable of being proved; they are counts copied from those upon the actual special terms of a charter party, stipulating to pay demurrage. Here there were no such stipulations, and no charter party.

Then there is a common count for hire of plaintiff's vessel, which would cover an ordinary charge for freight, such as appears to have been settled by the parties in January, long after the voyage was performed; and a general count for money due for demurrage is added, which count, it has been expressly determined, cannot be supported by merely giving evidence of unreasonable detention. There must either be a contract for demurrage, or the ship-owner must declare specially, that is, as Mr. Abbott says in his Treatise on Shipping. "he may have a special action "for the damage resulting to him from such detention, for demurrage, "properly so called, arises out of an express contract."—Abbott on Shipping, 263.

The case of Horn v. Bensusan, 9 C. & P. 709, is expressly in point to shew that the plaintiffs should have brought a special action. But the declaration here is not special, except as regards the two first counts, which the evidence did not support. The count for demurrage could only authorise a recovery for a sum of money due on an express contract to pay demurrage eo nomine, not a recovery for demurrage for wrongfully detaining the vessel, when nothing had been specified in the contract about demurrage.

Per Cur.-Rule absolute.

Moulson v. Eyre.

Cause referred at Nisi Prius, and verdict taken for the plaintiff, subject to the reference—award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made, and after that day had passed the defendant's attorney was asked by the plaintiff's attorney to consent to a farther enlargement, and declined; no application has been made to the arbitrators. The Court held they could do nothing more than set aside the conditional verdict.

In this case Vankoughnet obtained a rule to shew cause why the time for making the award should not be enlarged for one month, or why plaintiff should not be at liberty to retain the verdict taken in this cause at the last assizes, and enter judgment thereon; or why the verdict should not be set aside, and the rule making the rule of reference a rule of court discharged, and such order made respecting the rule of reference, as the court should think fit.

This case was referred at Nisi Prius—a verdict was taken by consent for 100l., subject to be reduced, or verdict entered for defendant; award to be made by last day of Easter term then next, with liberty to the arbitrators "to enlarge the time for making the award."

On the 24th day of June, 1848, the arbitrators did enlarge the time till the 1st of next Trinity term.

No award was then made; the plaintiff's attorney then went to the

defendant's attorney and asked him to consent to enlarge the time: the defendant being present refused positively to assent, and the plaintiff made this application to the court, not having (so far as appeared) applied to the arbitrator to make any further postponement, and not having made application till after the enlarged time had run out.

ROBINSON, C. J. delivered the judgment of the court.

These facts furnish no ground for our doing anything more than setting aside the verdict in order that the case may be again taken down to trial—the costs of the last trial to abide the event.

As to the costs of the reference, if the defendant has been in fault, the plaintiff must seek his remedy under that condition of the rule of reference which subjects either party to costs in case he shall throw impediments in the arbitration proceeding.

Bailey v, Stephens, r M. & Gr. 413, is consistent with this course, because in this case there is not a verdict absolutely for the plaintiff leaving the amount of damages only to be settled by arbitration; but whether the verdict should be for plaintiff or defendant, is subject to the decision of the arbitrators; and I take it to be clearly held in Bailey v. Stephens, that in such a case we have it not in our power to treat the verdict as being rendered without a condition, and allow judgment to be entered upon it.

Where the verdict has been rendered for the plaintiff, not subject to be reversed by arbitrators, but the amount of damages only allowed to be reduced by them, there the courts have gone greater lengths than it seems to me quite reasonable to do, in compelling the defendant, although he was in no degree the cause of an award not being made within the time, to consent to a new time being set, at the peril, if he will not consent, of having judgment entered against him for the amount of the verdict. But we cannot take such a course under the facts of this case.

Per Cur.—Rule absolute for setting aside the verdict—costs of the last trial to abide the event.

McFarlane v. Brown.

Variance between proof and deed declared on—counsel must determine at the trial, whether they will amend under the statute—leave cannot be reserved to amend the record afterwards.

The plaintiff declared on a covenant made by and between plaintiffs, defendant, and one Harvey, in which he said it was recited that they were indorsers for Culver and Cameron on two notes for £200 each, which had been discounted; that actions were pending against the three upon the notes, and that the bank had agreed to take a note of Calver and Cameron at 90 days for £300, and the residue in cash;—that the plaintiffs and defendants and Harvey had agreed to indorse this note on the understanding that if Culver and Cameron paid none or only a part, then they should each pay an equal proportion of such note for £300—that no one should have recourse on the other as a prior indorser for more than his share; and that the prior indorser should have power to collect from the others their equal proportions—and that the plaintiff, defendant and Harvey cov-

enanted each with the other, that they and each of them would pay an equal share of the last mentioned note, if Culver and Cameron should not pay the same.

The declaration then averred that Culver and Cameron made their note for £300, which plaintiff and defendant and Harvey indorsed; and he assigned as a breach of the covenant, that when this note became due plaintiff was forced to pay, and did pay the whole amount; and that although he gave notice of this to defendant, and demanded his proportion of the note, viz.: £100, yet the defendant would not pay.

The defendant pleaded with other pleas non est factum.

At the trial the plaintiff gave in evidence a deed in which this plaintiff, defendant, and Harvey, and one Thompson were parties, and in which it was recited that they four had agreed to indorse the £300 note, upon the understanding, with each other, that in case Culver and Cameron should not pay, then that they four should each pay an equal proportion of the said note, (and so on following the conditions as set out in the declaration,) and the four covenanted with each other, that they and each of them would pay an equal share of the said note, provided Culver and Cameron should not pay; and that they would not exact from each other a greater amount of the said note than the individual equal share of each.

The defendant moved for a nonsuit on the ground of variance, for the covenant only bound the defendant to pay $\frac{1}{4}$ of the notes, or an equal proportion as one of four, who were to be parties to the deed; whereas on account of Thompson never having executed the agreement, the defendant was sued as if he had covenanted as one of three to pay a n equal portion, which would be $\frac{1}{6}$.

The learned judge offered to let the plaintiff amend the count, to mak e it agree with the fact that he undertook in effect to pay $\frac{1}{4}$, but the plaintiff's counsel would not determine at the trial to amend.

A verdict was given for plaintiff: leave being reserved to move for a non-suit on the objection.

Vankoughnet supported the rule—contending that the plaintiff having been offered leave to amend, should have done so, and not having done so must be nonsuited for the variance between the declaration and the deed; he cited 2 C. & Kir. 372; 5 B. & C. 259.

· Robinson, C. J., delivered the judgment of the court.

There can be no doubt that if the plaintiff could by any means have enabled himself to recover under the circumstances of the case, he should have made such amendment at the trial, and cannot reserve a right to have made such amendment at the trial, and cannot reserve a right t elect to make it afterwards—and if plaintiff could have amended so as enable him to recover, (which I do now say that he could,) yet not having done so, the variance between his proof and declaration is fatal, for the deed is not set out, either according to its tenor, or its lega effect.

Per Cur.-Rule absolute for a nonsu

REGINA V. MCLEAN.

A mandamus nisi issued upon a rule obtained for that purpose, must be consistent with and authorised by the rule, otherwise it may be quashed on motion before the return to the mandamus nisi is filed.

The Solicitor-General moved to quash the mandamus nisi issued in this case, before its return has been filed, upon the ground that the writ was not authorised by the rule the court had granted.

The rule was for a mandamus to deliver to the treasurer of the Eastern District, or other person appointed by the district council to receive the same etc.

The writ was to deliver to the district council, or person authorised (not said by whom) to receive the same, &c.

The rule was to deliver all other books, papers, and muniments remaining in the hands of the said Alexander McLean, the property of the said Eastern District Council, and connected with the said accounts of the said district.

The writ was to deliver "all books of account in your custody, power, "or possession, relating to the office of treasurer within the said district, "during the period of your serving the said office" (not limiting it as the rule did, to those which were the property of the district council).

Vankoughnet in support of the rule to quash the mandamus, cited 5 T. R. 66; 2 Smith, 54; 1 Q. B. R. 161; 10 A. & E. N. S. 162; 3 A. & E. N. S. 655; 8 B. & C. 681; 10 A. & E. 531; 8 Jurist; 1 W. Bl. 145; 6 T. R. 168; 4 M. & S. 515; 1 Ch. Rep. 253; Sid. 148.

Connor shewed cause, and cited 2 Salk. 433, 486; Str. 640, 897; 2 Burr. 784; 2 Salk. 701; Sts. 55; I Q. B. K. 161; 7 T. R. 543; Bull. N. P. 204; Str. 857, 879; 4 A. & E. 139; Sid. 31; Sayer, 36; 4 Mod. 233; 8 Mod. 111.

ROBINSON, C. J., delivered the judgment of the court.

We granted at once the mandamus nisi, in the hope of arriving more speedily at a decision of any question that might present itself upon the return, as in these cases it is desirable, for the sake of public convenience, that the remedy should not be delayed.

But now, before any return is filed, a motion is made to quash the writ, so that the object of expedition in putting an end to this controversy is not likely to be attained.

It is doubtless in the power of the defendant, to move in this stage to quash the writ; the books contain many cases of such applications. Sometimes the writ is quashed or superseded *quia improvide emanavit*, when there is no particular defect in the writ itself, but when it has been awarded on insufficient grounds.

In other cases, the application is made on account of something objectionable in the writ itself, as where it is badly framed to meet the case, or shews on the face of it an insufficient case, or when it has been framed in a manner repugnant to, or unauthorised by, the rule on which it was taken out.

In cases of the last mentioned description, the courts have always said, we awarded only such a writ as should properly issue upon the ground shewn; not any writ that the party suing it out might choose to

frame. The court knows nothing of the writ which has actually issued, until their attention is called to it by a motion like the present, to quash it for some alleged defect.

We regret to be compelled to say, that the writ which has been framed and issued in this case, cannot be sustained, because it is unauthorised by the rule.

Per Cur.- Mandamus quashed.

Brunskill V. Chumasero and Keating.

and B., partners, agree to sell to C. 500 barrels of flour, at so much per barrel, to be paid per hundred barrels, after the delivery and upon the production of the wharfinger's receipt. The son of A. (one of the partners) came to C. with the wharfinger's receipt for one hundred barrels; C. gave him a check for the amount due, in favour of the firm, and took his receipt. As the son was leaving C.'s store, a clerk of C.'s reminded him that a private note of A.'s to C., for £40., was then due and unpaid. A.'s son, with the proceeds of C.'s check, took up his note of £40. B. the other partner in consequence of this application of the money of the firm by A., refused to send C. any more flour till the £40 was made good to him; C. then sued A. and B. and recovered; and, Held per Cur., on a motion for a new trial, that the payment to A.'s son, under the circumstances, was such a payment to the partnership as acquitted C. upon the A. and B., partners, agree to sell to C. 500 barrels of flour, at so much per stances, was such a payment to the partnership as acquitted C. upon the whole sum paid.

Semble, that if it could have been shown by B., that C. paid A.'s son upon the previous understanding that A.'s private debt was to be retained out of the check given to the firm, the son's receipt would not have discharged C. from the re-payment of the £40 to the firm.

Bought and sold notes, like the one in this action, may be treated as an actual sale, though the fact may or may not be, that the one party has not at the time a specific lot of the article in his possession, and actually set apart for the particular vendee.

The plaintiff declared in assumpsit in one special count, setting forth that on the 6th of January, 1847, he had at the request of the defendant, bargained with the defendants to buy of them, and that the defendants then sold to him, a large quantity, to wit, five hundred barrels of flour, "warranted fine, at the rate of 21s. for every barrel, the barrels to be good, "and well coopered, and to be delivered by the defendant to the plaintiff, "before the 1st of April, then next, at Maitland's wharf, in Toronto, free "of charge; and to be paid for as follows, viz., for each hundred barrels "upon the delivery, and upon the production of the wharfinger's receipt."

The plaintiff then averred mutual promises to accept and deliver, and alleged that although the time had expired, and the plaintiff had been always ready to receive and pay for the flour according to the agreement, of which the defendants had notice, and though the defendants did deliver two hundred barrels at Maitland's wharf, in pursuance of the agreement, vet that they had never delivered the residue.

Pleas by the defendant, Keating: 1st, non-assumpsit.

andly. That the defendant delivered two hundred barrels of the flour to the plaintiff according to the agreement, yet the plaintiff did not, nor would, though requested, pay for the same at 21s. a barrel, according to the agreement, but on the contrary kept and detained out of the price of the said two hundred barrels, 40l., which remained still wholly unpaid.

The plaintiff replied to this second plea, that he did not keep or detain out of the price of the two hundred barrels in the plea mentioned, any sum of money as in the said plea alleged. Chumasero suffered judgment by default.

The agreement sued on was in writing, as follows:

"Toronto, 6th January, 1847.

"Sold to Thomas Brunskill, 500 barrels, warranted fine flour, of Humber Mills brand, at 21s. cy., per barrel, barrels to be good, and well coopered, and to be delivered before the first day of April next, at Maitland's wharf, free of charge. Terms, cash on delivery of receipts for every hundred barrels."

(Signed) "Mason, Chumasero & Keating."

One hundred barrels were delivered immediately on the contract being made, and were paid for by a check on the Bank of Upper Canada, for which Mason, one of the parties, gave a receipt. On the 20th of January, a son of Mason's, a grown-up young man, came with the wharfinger's receipt for another hundred barrels, and the plaintiffs then handed him a check in favour of the firm for the amount, 105l.; but the plaintiff's clerk, who was present, recollecting that a note of Mason's to the plaintiff, given on account of a private dealing between them unconnected with the firm, had fallen due on that day, he followed young Mason out after he had got the check, and told him of it, but without being directed by the plaintiff to do so. It appeared that young Mason, or his father, took up that note of Mason's to the plaintiff (which was for 40l.) out of the money thus received, and Keating objecting to such an application of the money, refused to deliver any more flour under the agreement, until the 40l. was made good to him. The defendant Keat_ ing filed an affidavit, on moving for the new trial, in which he stated that it was expressly agreed between the firm and the plaintiff, at the time of making the contract, that all the money was to be paid by plaintiff into the hands of Keating, in order that he might apply it in purchasing further quantities of wheat. He failed, however, in proving any such stipulation or understanding, at the trial, and all turns on the question, whether looking at the contract alone, the payment to young Mason, was such a payment as acquitted the plaintiff, and if so, then whether the fact of Mason having, out of the proceeds of the plaintiff's check, paid 40l. to the plaintiff on account of a private debt of Mason's, can have the effect of cancelling that payment pro tanto. Verdict for the plaintiff. The damages given by the jury were 75l., the sum proved to be the loss to the plaintiff in consequence of the failure to deliver the rest of the flour.

H. J. Boulton, Q. C., moved for a new trial on misdirection, and on the law and evidence, and on affidavits. He cited 8 B. & C. 277; 2 Ch. Pl. 160, 4; 1 H. Bl. 20.

Blake, Sol. Gen., shewed cause and cited 3 M. & S. 178; 7 Taunt. 270; 2 M. & S. 397; 8 B. & C. 277; 6 B. & C. 388.

ROBINSON, C. J., delivered the judgment of the court.

Whatever may be the facts of the case, it is the evidence given upon the trial which must govern. If there really was such an agreement as Keating swears, namely, that the money should absolutely go into his hands, it was necessary for him that he should be able to prove it, which

it appears he could not do. His own assertion of it cannot avail him. The effect of the agreement, as proved by the writings, would according to general principles of law be, that any of the partners could receive the money, or any person bringing their authority; young Mason coming with their receipts, comes, as I think, with proper vouchers for his authority; if so, then the 100l. was paid when young Mason received it. But if the payment were shewn not to have been made bona fide, on the plaintiff's part, but upon a previous misunderstanding between him and Mason, or Mason's son, that the private debt of Mason was to be paid out of it; if (I mean) it was so arranged that the payment on the receipt could only be said to be made conditionally with the intention that the one hundred pounds was not all to go into the hands of the firm, but that 40l. should be left in the bank to make up Mason's note, then it. might have been properly submitted to the jury that the plaintiff had not paid to the firm the 100l. as he was bound to do; but taking the fact to be just as the evidence represented it, I think the jury would not have been warranted in finding otherwise than they did, for that shewed it to be optional with the person receiving the money to take up the note or not; it was a mere suggestion not improperly made, and not at the plaintiff's instance; and the plaintiff's clerk might naturally think that the partners would have no difficulty in arranging a small matter of that kind among themselves, and that it would be for the common credit and interest of all, that a note of one of them should not lie in the bank unpaid.

With regard to the exception taken to the declaration, it is common in this kind of transactions to pass bought and sold notes like that sued on; both parties treat it as a sale, though the fact may or may not be that the one party has not at the moment a specific lot of the article in his possession, and actually set apart for the particular vendee. He sells the flour and undertakes to deliver it by a day named.

The defendants in this case profess to sell, and it does not lie in their mouth to say they did not sell, in order to compel the plaintiff to declare on an instrument different from that actually given. Boyd v. Siffkin, 2 Camp. 326, is similar in that respect to the present.—5 M. & W. 462.

We are of opinion the rule should be discharged.

Per Cur.-Rule discharged.

McPherson v. Dickson.

A plaintiff apprehensive that he may have signed interlocutory judgment too soon, cannot cure his irregularity by filing and serving a replication and notice of trial conditionally, viz., to take effect in case the judgment should be set aside.

Semble, however, that the defendant by arguing the conditional replication, on a demurrer, may waive its irregularity.

Covenant on a sealed agreement of the defendant, by which he engaged as security for William Dickson, to pay such advances as had been made, or as should be made by the plaintiffs to William Dickson, for the purposes mentioned in the agreement.

The defendant craved over, and set out the agreement, and pleade non est factum, and some other pleas.

The plaintiff joined issue on the 1st, 6th and 7th pleas, and replied de injuria to the third plea, and demurred to the 2nd, 4th, 5th and 8th pleas.

The agreement was made 29th September, 1846, and recited that William Dickson had been engaged in the lumber trade, and was desirous to continue in the same, and "would require certain advances there-" inafter mentioned, to carry on the same, to secure the payment of which, "he had agreed to transfer the timber therein manufactured," and thereby in consideration of the premises and of the covenants, &c., to be performed on the part of the plaintiffs who execute as parties of the third part, this defendant, as surety for William Dickson, being the second party to the agreement, bargained, sold, and assigned to these plaintiffs all the red pine timber which he had any right to, and was then growing on his (William Dickson's) limits, on the Coulonges Rivers, and all the squared and other red pine timber, masts and spars which he should make on the said limits, and all the oars, binders, &c., to hold to them, &c. "Provided always, that if before the first day of September "then next (viz. 1847) if the said timber be not before then sold and "disposed of at Quebec; but if the said timber be sooner sold, then "plaintiffs, all such sums of money which now are, and shall or may " become due and owing from him to them for goods, provisions, produce, " and cash, which they now have and shall or may advance to him dur-"ing this fall, ensuing winter, spring, and summer, under the covenants " contained in the agreement, or otherwise, and shall upon the sale of the "timber, pay to the parties of the third part, a commission of 5 per "cent. on the amount for which said timber may sell, for their trouble "and expenses respecting the sale; and shall in all things observe the "covenants on his part, then the agreement (these presents) shall become " void."

Then William Dickson and this defendant covenanted with the plaintiffs, "that William Dickson should, whenever requested by the plaintiff or their agent, execute any further assignment for more perfectly assuring the property to them, that he would during the fall of 1846, ensuing winter and season, make 60,000 feet of timber as described on the limits aforesaid, and mark each piece as made with his mark and plaintiff's, D. "M., and would deliver such timber to them, and would raft it during the ensuing spring, supply it with all necessary oars, withes, &c., and "convey it to Quebec for the parties of the third part, and there safely deliver the same to them or their agents."

William Dickson by the agreement, gave to the plaintiffs or their agent, "authority to enter upon, have, take, and keep possession and controul of, the said timber, cribs, rafts, &c.. which may be made, and to bargain, sell, and dispose thereof in the Quebec market, to any person willing to purchase at such prices as can be obtained."

And Andrew Dickson (this defendant) covenanted with plaintiffs, "that William Dickson should and would at the times and manner "limited in the proviso, well and truly pay to the plaintiffs, all monies "which now are and shall become due, owing and payable from the said party of the first part, to them for cash, goods, provisions, and produce, advanced and to be advanced by them to him, under the covenants

"thereinafter contained and otherwise. And also that William Dickson " should pay to the plaintiffs a commission of five per cent on the amount " for which said timber may sell, for the expense and trouble respecting "the same, and the sale thereof." The plaintiffs on their part covenanted with William Dickson, "that in case he should observe his covenants. "they would, in proportion as he should proceed in manufacturing the "timber and conveying the same to market, advance to him, and supply "him with goods, provisions. &c., to 600l., and in cash 600l., provided "that William Dickson and this defendant shall, if required, at the time " of any such advance, give their acceptances or notes for the amount of "such advances; And also, that if and after they should have sold and " received the proceeds of said timber at Quebec, they should pay to Wil-" liam Dickson the balance which may be over, after deducting advances. "commission and other charges which the timber may be subject to in "the said port, and for men's wages and other expenses attending the " same, &c."

The plaintiffs, after setting out the substance of the agreement, averred that on the day of the date, viz., 29th September, 1845, 2000l was due to the plaintiffs for advances before then made to William Dickson, and that on 1st September, 1847, a further sum of 3000l. became due for cash, provisions, &c., advanced after the making of the agreement, and in pursuance thereof; and on 1st January, 1849, a further sum of 2000l. for cash, goods, &c., advanced to him after 1st Sept., 1847; and they then averred performance of all things on their part, and alleged as breaches, that William Dickson had not paid any of these sums of money, which were all laid under a videlicet.

At the trial, which took place at Perth, before the Chief Justice, the defendant Andrew Dickson, who is sued alone on his joint and several covenant as surety, offered no evidence in support of any of the pleas in which issue was joined, and in fact attempted no defence, his attorney relying, as was stated, on some irregularity in the plaintiffs' proceedings.

The plaintiffs proved the agreement; and they proved further, that before the agreement was made, there had been advanced to William Dickson 1234l. 13s. 4d. payable 1st August, 1846, and between that time and 1st September, 1847, 2202l. 2s. 6d.

It appeared to the Chief Justice, at the trial, that there was no clear understanding to pay anything until the timber should be sold at Quebec, but certainly for no advances made after the 1st September, 1847. The words, "and otherwise" however, used in the agreement, might, as he afterwards thought, cover such later advances. Proof was given of advances made after 10th September, 1847, 655l. os. 4d.,—in all 4091l. 16s. 1d.. But this last item included men's wages, and 165l. 16s. 7d., part of these wages, was payable to the men before 1st Sep., 1847, and was not paid to them at the time on account of some dispute.

The timber, it was admitted by the plaintiff, was sold at Bytown, for 2151l. 19s. 9d., which left a balance due plaintiffs of 1939l. 16s. 4d. with interest since accruing—in all, 2017l. 8s. 2d.

If the third breach could not be recovered upon, then 165l. 16s. 7d. would have to be deducted as charged for men's wages against the proceeds of the timber.

The jury was directed to find for the plaintiff 2017l. 8s. 2d., subject to the opinion of the court, whether any thing could be recovered in respect to the third breach, and if not, the sum and interest was to be adjusted according to the opinion of the court, and deducting from the credit which the plaintiffs have allowed, such portion of the 655l. as ought to go against the proceeds of the raft.

A. Wilson, for the defendant, relying on his objections to the plaintift's proceedings, moved in term to set aside the replications and demurrers, and all proceedings had thereon, or the rejoinders and joinders in demurrer, added by plaintiffs, for the defendant, and the proceedings had thereon, or the notice of trial and all proceedings therein, for irregularity, with costs.

ist. Because when the replications and demurrers were filed, and notic of trial was served, judgment had been signed against the defendant f want of a plea.

andly. Because they were only filed and served conditionally—that i if the judgment should be set aside—and the plaintiffs proceeded thereo as if regular, after the defendant had served a notice of intention to except against the proceedings as irregular.

3rdly. Because notice of trial was served on 5th May for the 9th, while there was no reason why the plaintiffs should not have given full notice trial, the time admitting of it.

4thly. Because there was nothing said in the notice, of assessing contingent damages on the demurrer.

5thly. Why new trial should not be had on the merits, the verdict being excessive and unjust.

On the 7th day of April, 1847, the defendant was bound to plead, according to the demand served, but he obtained time to plead to 22nd April, on the usual terms.

On the 24th April, interlocutory judgment was signed in the office at Perth, no pleas being then on the file.

The defendant had on the evening of the 22nd April, left pleas at the residence of the deputy clerk of the crown, but they had not been filed nor any copy served.

Notice of assessment of damages was given on the 24th April, for the assizes at Perth, which were to open on the 9th May.

On the 28th April, the defendant's attorney sent affidavits from Perth, to move to set aside the interlocutory judgment for irregularity, which application was made in chambers, at Toronto, on 30th April. The grounds were, that judgment had not been signed till the pleas had been served and filed; and because the plaintiff had accepted pleas not withstanding the judgment; and he moved in the alternative to set aside the judgment on payment of costs, and that the plea should be permitted to stand.

On the 3rd of May, the judge in chambers set aside the interlocutory judgment as irregular, with costs, and the order was served on the plaintiff's attorney, at Perth, on the 8th May.

On the 5th of May, 1848, the plaintiffs filed and served replications to the defendant's pleas, before they knew what would be the event of the defendant's application, for setting aside the interlocutory judgment, giving written notice, at the same time, to the defendant's attorney, that

the replications were filed and served, subject to the decision of the judge at Toronto, upon the application to set aside the judgment, and they were not intended to operate as a waiver of the judgment, but would be relied upon in case of judgment being set aside; and at the same time the plaintiffs served "notice of trial" for the assizes, being to commence on the 9th.

The defendant on the next day returned this notice of trial, and served a notice on the plaintiff's attorney, that if he persisted in going to trial, the defendant would move against his proceeding for irregularity, because the plaintiffs not having withdrawn their judgment, their filing and serving replications and demurrers was irregular and inconsistent; that the defendant was not bound to receive short notice of trial, under the circumstances, even though he had been under terms when he obtained time to plead, because by signing judgment, the plaintiffs had put an end to the condition; and they had besides time to have given full notice, if they had not themselves delayed and impeded the proceeding.

The plaintiffs proceeded nevertheless on their notice, and at the assizes the verdict was rendered as before stated, and defendant obtained a rule nisi on the terms already mentioned.

Philpotts shewed cause, and relied upon Davis v. Davis, Michaelmas Term, 6 Wm. IV.

ROBINSON, C. J., delivered the judgment of the Court.

The affidavit of merits filed by the defendant is contradicted in its most material statements by affidavits filed on the part of the plaintiffs. The questions are, 1st, Can defendant complain of the manner in which the plaintiffs filed their replications and demurrer (i. e. conditionally), seeing that he has himself concurred in arguing the demurrer? and as the judgment has been actually set aside before the plaintiff's replication and demurrer were filed, must these not at any rate be recognized as being properly filed and served, especially as the defendant did not move promptly to set them aside.

2ndly. Is the plaintiff's notice of trial irregular—1st, for omitting to notice the assessment to be had of damages on the demurrer; 2nd, in not being full eight days' notice.

3rdly. If no irregularity, then there shall be a new trial on the merits paying costs.

4thly. If not, then shall the verdict be altered, in pursuance of the leave reserved? or is there good ground for setting it aside, as against the law and evidence?

This is a case in which the plaintiffs have embarrassed their own proceedings by too rigidly signing judgment, when they knew that the defend ant had his pleas ready, and when they had no reason to apprehend that they would lose their opportunity of trying at the assizes.

Having signed judgment, they became apprehensive that their act in doing so could not be supported under the circumstances; and then they desired to take the inconsistent course of filing and delivering replications to the defendant's pleas, after having signed judgment for want of a plea. They did this, however, conditionally; that is, to have effect in case the judgment should be set aside, otherwise not. The plaintiffs have referred us to no case that supports this indecisive mode of practice, and we

have found none. They gave their notice of trial in the same conditional manner, i. e., to stand or not, according as the judgment should be set aside or not.

As to the replications, the defendant by afterwards recognizing the plaintiff's demurrer, and arguing it when he was no more bound to notice that than the replication delivered at the same time, has precluded himself, I think, from objecting to them as not being filed or delivered so as to entitle them to be accepted.

That, however, does not apply to the objection taken to the notice of trial. And we consider the notice of trial irregular, not only on the ground first taken, but because it was not served in time, unless the defendant continued bound by the terms to accept short notice, on his obtaining time to plead. He was not, we think, so bound, after the plaintiff had demurred to several of his pleas, and had signed judgment; and we therefore make the rule absolute for setting aside the verdict without costs.

And we add that the plaintiff's case seems to us subject to doubt and difficulty, from the ommission in the declaration of any averment of the timber having been sold; and that the parties will do well to consider on both sides whether they should not apply to amend their pleadings.

It is further our impression, that the plaintiffs cannot under the contract, recover for money or supplies furnished after the 1st of September 1847.

Per Cur.—Rule absolute. Verdict set aside without costs.

PATERSON V. BLACK.

Whether in loss of cargo loaded on deck—the ship owned will be liable—depends on the usage prevailing, in respect to deck loading in the particular navigation.

Case against defendant as a common carrier for loss of goods.

Plea "not guilty."—2nd That it is a custom in navigating lake Ontario, to carry cargo on deck—that the plaintiff's goods were laden and stowed on deck—and that a storm arising, they were of necessity thrown overboard, for the preservation of the vessel and cargo. Replication de injuria generally, not expressly admitting, nor specially traversing the custom—Held perCur.—that under these pleadings, the custom of the trade, as well as all questions tending to show negligence, either in the method of loading, or in the management of the vessel, or in the throwing overboard of the goods, without adequate reason—were put in issue.

Case against defendant as a common carrier for loss of goods.

Plea "not guilty."

2. That it is a custom, in the navigating this lake, to carry cargo on deck. That plaintiff's goods were laden and stowed on deck—and that a storm arising, they were of necessity thrown overboard, for the preservation of the vessel and cargo.

Replication, de injuria generally—not expressly admitting, nor specially traversing the custom.

The evidence shewed that the defendant's vessel took in the cargo for plaintiff, on 10th of Nov., at Kingston, to be carried to Toronto,—

that about 800 bars and bundles of iron and steel, of plaintiff's were placed on the deck, though the hold of the vessel was not full. That on the first night after they sailed, a storm arose on the lake, and the schooner was dismasted, and one of the masts in falling, having been loosened from its step, tore up the deck, so that there being a heavy sea, the water got into the hold, and damaged some of the goods below, among which was some cutlery and hardware of plaintiff's—and that there being imminent danger of foundering, it was thought necessary to lighten the vessel by throwing off a portion of deck load—and 500 bars and bundles of plaintiff's iron were, in consequence, thrown overboard.

It was proved by many witnesses called, that it had always been the custom, on the lakes, to load cargo on deck, more especially flour and iron, and not less in the autumn, than at other times.

It was proved, further, that there was no want of soundness in this vessel, or equipments; nor any negligence, or want of skillful management, to be imputed to the master, so that the damage sustained from the vessel being dismasted and the deck torn up, might be fairly considered as com¹ ing under those danagers of navigation which were exempted in the bill of landing.

As to the throwing overboard of the iron—the jury found that it is the custom, in navigating this lake, to store part of the cargo on deckand if under the circumstances, either as regards the season of the year or the description of cargo, or the proportion stowed on deck, the custom had been improperly exceeded, the charge of the learned juge was such as to leave it to the jury to express that opinion. It was sworn by several witnesses, that, in their opinion, it was the throwing overboard of the iron that alone saved the vessel-and if therefore that had been all stowed below, it would have been either equally thrown over (the necessity of lightening the ship being still the same,) or the vessel, so far as can be judged, would have perished with her cargo. Considering how the case went to the jury, and their verdict it is to be inferred that they were satisfied that the custom of navigation on these lakes (and there was proof of the usage for 30 years), fully sanctioned the placing the iron on the deck, and that its being there was not the cause of its being thrown overboard (when that would have been otherwise unnecessary), but that its discharge was a matter of imperative necessity, not on account of its being improperly in the way, and impeding the working of the ship, but in order to lighten the vessel, which the position of the cargo on deck, happily favoured—that, moreover, not being an unusual or improper situation for it to be placed in.

Verdict for the defendant.

J. H. Haggarty, moved for a new trial, but only desired it, in case the court should think, that in the pleadings it was open to him at the trial to contest the existence of the custom, so that the question of such an alleged custom could be entertained by the court upon any rule to be granted—he cited Grousettee v. Ferrie, in our own court, Merritt v. Ives; Do. Stephens v. McDonnell; Do. Abbott on Shipping, 423; 9 C. and P. 380: Park on Insurance, 26. He also referred to the English acts, 2 & 3 Vic., ch. 44; 3 & 4 Vic., chap. 36

Hector shewed cause, and cited Grousette v. Ferrie, 4 Camp. 6 142; 4 Bing. N. C., 134; 3 Q. B. R. 120.

ROBINSON, C. J.—The case of Grousette v. Ferrie—decided in this Court, in Michaelmas Term, 1842, determines the point raised here—and this is, indeed, a stronger case in favour of an implied premission to carry on deck, then that was, on account of the nature of the cargo, which, in the present case, was iron, an article not liable to injury from wet, and which lies flatly on the deck, not being apt to shift its position in a sea—and not forming an impediment to the working of the ship, as casks and other deck loading might do, from their being in the way, and more likely to be displaced in a time of confusion.

If no cargo could properly be loaded on deck, then the iron could not be, and the consequence in any such case must be, that if such an exigency arose, as was proved in this case, rendering it necessary to lighten the ship, by throwing out part of the cargo, either the goods would have to be brought out of the hold for that purpose, with greater difficulty and delay, which would be no advantage to their owner, if they must at last be sacrificed, or if in consequence of their not being so easily and quickly got at, the vessel could not be lightened in time, and should founder, then all the goods would be lost. The plaintiff, in this case, has suffered nothing, unless we conclude that his iron, from being more ac cessible, was thrown over needlessly—when it might as well have been saved. That involves, however, the question of negligence and want of skill, which was expressly submitted to the jury—and they have acquitted the owners of any fault of that kind.

The case of Da Costa v. Edmunds, 4 Campbell, 143 shews that it is the general usage which is to govern as to deck loading, subject, of course, to a just consideration to be always given to the facts of each case. What that general usage is, was very clearly shown on this trial—and the evidence supported the verdict—showing the loss of such a deck cargo as this was, in consequence of a violent storm, to come fairly within the perils of the navigation, against which parties may insure, and against which the ship owner does not undertake to save the merchant harmless. There was, besides, some evidence here of an actual acquiescence in the iron being placed on the deck, though the case does not, I think, require that to support it.

The case of Gould v. Oliver, 3 Bing. N. C., 134, is so clearly and expressly in point, on this question, that no other need be cited.

I apprehend that the pleading here did put the custom of the trade in issue, and that it was proved—and that all questions which could be raised as tending to shew negligence, either in the method of lading, or in the management of the vessel, or in the throwing overboard the goods without adequate reason, were also in issue, and were pronounced upon by the jury.

Per Cur.—Rule discharged.

RUSSELL ET AL. V. CRYSLER.

Held per Cur.—That a conversation—in which the defendant admitted "that the plaintiff had a judgment against him—that (the defendant) "had then no means of paying it, but that if they would be reasonable, "he thought his friends would assist him, 'adding,' that he was entitled "to some credits which the plaintiffs had not allowed him, and that-if "they would agree to accept land, he thought he could manage to pay "them, in that way, £1000.'" coupled with a letter, in which the defendant proposed to the plaintiff to "make over to them, for their claim against him, about 6000 acres of land,"—was a sufficient admission of a debt of £1000, under the account stated, to take the case out of the Statute of Limitations.

Assumpsit on a judgment entered in the Court of King's Bench for the District of Montreal, in Lower Canada, on the 19th April, 1827, for £2081. 17s. 5d. damages, and also for the plaintiff's costs and charges, &c., with a second count for interest, and a third count on an account stated

Pleas, 1st. Non assumpsit.

2nd. Admitting the entry of sjudgment, but stating that the defendant never was served with process to appear and answer in the court at Montreal, and had no notice of the action being pending against him.

3rd. That the judgment was obtained by fraud.

4th. Payment.

5th. Set off.

6th. Statute of Limitation to the 2nd and 3rd counts.

Replication to 2nd plea—that before the rendering of the judgment, the defendant was resident in Montreal, and had notice of the several proceedings and processes had by the plaintiffs in the suit.

Replication to 3rd plea—traversing the fraud alleged—taking issue on the pleas of payment and set off—and replying to the last plea, that the action on the 2nd and 3rd counts, did accrue within six years.

On the trial the plaintiff gave no evidence in support of the issue on the 2nd plea.

As regarded the issue on the Statute of Limitations, a witness who had been employed by the plaintiffs as their agent, to urge the defendant to pay the amount of the judgment, swore that he went to him for that purpose, that the defendant admitted that the plaintiff had a judgment against him, and said that he had then no means of paying it; but that if they would be reasonable, he thought his friends would assist him. He added that he was entitled to some credit, which the plaintiffs had not allowed him, and that if they would agree to accept land, he thought he could manage to pay them in that way 1000l.

On cross examination, this witness said that the purport of the defendant's conversation was, to turn out lands to the amount of 1000l. The defendant spoke of it as a large transaction, and of long standing, and he said there never had been a settlement between him and the plaintiffs; but the witness swore that he understood him fully to admit in his conversation, which took place in 1845, that he owed the plaintiffs as much as 1000l.

Then a letter was put in, dated 22nd February, 1843, from the defendant, in which he proposed to the plaintiffs "to make over to them

"for their claim against him, about 6000 acres of land," making no more particular mention of the debt.

The jury were directed, that if they were satisfied from the evidence, that although the defendant spoke of some credits which ought to have been given to him, that he meant nevertheless to admit that roool. could be justly claimed from him as being due upon the judgment, they might allow the plaintiffs that sum at least, and interest upon it from the time of the conversation proved, taking it as an account stated on that day.

The jury gave a verdict for the plaintiff, 1150l.

Vankoughnet moved for a new trial on the law and evidence, and for misdirection; he cited 5 M. & W. 656, 418.

J. Lukin Robinson shewed cause, and cited 7 Bing. 101; 2 C. & P. 108; 4 Moo. & P. 729; 13 E. R. 249; 1 Cr. & M. 483.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the verdict may be supported by the evidence given, it being left, as it was, to the jury to find whether the defendant admitted to the plaintiff's agent, that he did owe on the judgment as much as the roool. which he offered to pay in land.

He admitted the judgment, which admission might in strictness have been taken by the jury as evidence, that it was a legal subsisting judgment, and that it was not rendered against him under circumstances that made it void. He had not, he said, received credit on that judgment for all the payments which he had made. The debt and interest, according to the judgment, being now about 4000l., gave room for a very large reduction; and as the plaintiff's agent swore that he understood the defendant quite to admit that he owed as much as the 1000l. and as we also see that the defendant had offered in writing to convey 6000 acres of land, which could hardly be worth less than 1000l., in payment of his debts to the plaintiff's, we think the jury were justified in taking the defendant's conversation with Captain Bullock as evidence to support an admission of 1000l. as being due on a subsisting judgment, and that admission was within six years.

Per Cur.—Rule discharged.

ATTORNEY-GENERAL V. WARNER.

Under the Imperial Act, 8 & 9 Vic., Chap. 93, Sec. 89. The Surveyor of Customs not being the party either "seizing or informing" is not entitled to a share of the penalty. He cannot therefore be rejected as an incompetent witness upon a case of information, for a penalty for harboring smuggled goods.

This was a case of Information, for a penalty for harboring smuggled goods, with a count for illegally assisting in their removal.

The offence was laid to have been committed between March, 1846, and the filing of the information, which was in Easter Term, 10 Victoria.

At the trial which took place in the spring of this year, a question arose as to the admissability of a witness, Dixon, the Surveyor of Customs at the port where the seizure was made. He was called on the part of

the Crown, and was objected to as incompetent from interest, being entitled to a share of the penalty.

On his examination on the voir-dire, he swore that he believed himself to be entitled to a share of penalties, as well as of seizures; that he was informed, in a letter from the Commissioner of Customs, that he should have a share of all penalties and forfeitures—and had always acted under that belief. He was rejected as incompetent, and moved for a new trial on account of his rejection.

The arguments of counsel in this case, are fully stated in the judgment of the court.

Robinson, C. J., delivered the judgment of the court.

The information must be looked upon as being filed under the Imperial Act, 8 & 9 Vic., ch. 93, "for regulating the trade of British possessions abroad;" and the statute contains no provision under which it can be contended that the informer, or other person entitled to a share of the penalty, can be a witness for the prosecution.

On the argument of this case, the Provincial Statute 9 Vic., ch. 31, was referred to as having a bearing on the question, by making the interest of the witness in this case contingent, and not certain, depending entirely on the pleasure of the Government. The Statute, however, can have no effect in this case, because it applies only to the proceeds of goods seized as forfeited—not to penalties.

The later Provincial Statute 10 & 11 Vic., ch. 31, was also referred to in the argument, the 52nd clause of which contains a provision by which the whole of the penalty, or forfeiture, goes to Her Majesty, "and may be divided between the collector and any person giving information, or otherwise aiding in effecting the condemnation of goods, or the recovery of the penalty, in such proportions as the government may direct."

This statute again can have no effect in this case, because it did not come into force until after 1st January, 1848, on a day to be fixed by proclamation. If this Provincial Statute had been applicable in point of time to the penalty in this case, then it would have been a question whether as the offence alleged in this information comes clearly under the Imperial Act 8 & 9 Vic., ch. 93, it is not that statute which must govern in regard to the distribution of the penalty; a point which under the circumstances of this case we need not consider.

Then confining ourselves to the Imperial Act 8 & 9 Vic., ch. 93, we find nothing in it which can influence the question of the competency of this witness. But we have been called upon to consider the effect of the 132nd clause of the Imperial Act 8 & 9 Vic., ch. 87; which provides, that every (such) officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty aforesaid, notwithstanding such officer, or other person, may be entitled to the whole or any part of such seizure or penalty, to any reward upon the conviction of the party charged in such suit or information."

The very insertion of such a clause in the Imperial Statute, gives strong evidence that the principles of law, without that special provision, would have excluded the testimony of a witness entitled to a share of the alty. And it is q uite clear, I think, that neither this particular

clause, nor any other part of that statute, applies to the inland trade of this country. It was passed wholly with a view to the trade of the United Kingdom. The trade of the British Colonial possessions is to be regulated under the other statute passed in the same year—ch. 93, (see 8 & 9 Vic., ch. 87, sec. 82). And the 46 sec. of the latter act provides that the duties upon importations, in the course of the inland trade of these colonies, shall be levied and recovered in the same manner, and by the same means, and under the same rules, regulations, restrictions, penalties, and forfeitures, as the duties on the like goods imported by sea (that is imported by sea into these colonies).

The uniformity of regulation established by this statute, is not between importations by our inland trade *into these colonies*, and importations by sea into the *United Kingdom*, but between importations by inland navigation, and by sea into these colonies; so that we are thrown upon the 8 & 9 Vic. ch. 93, and have no authority to travel out of it; and since that act is silent on this point of the inadmissibility of witnesses, and there is no other statute, British or colonial, which, (so far as we are informed) can affect the question, we are left to the principles of the common law, which it is contended exclude the evidence of this witness. Dixon.

The 84th clause of the 8 & 9 Vic. ch., 93, gives in express terms "one "third of the penalty to the person who shall seize, inform and sue for the "same." That is a certain and direct interest, and this witness, it is said, is the person informing and suing through the attorney-general. In the cases of Rex v. Stone, 2 Lord Ray. 1545, and Rex v. Tilly, 1 Str. 316, the convictions were quashed because the same person was both informer and witness, and entitled to a part of the penalty.—Rex v. Banks, 1 Esp. 144; Rex. v. Beavan, R. & M. 242.

In the course of applying the principle, there have been fluctuating and apparently contradictory decisions, depending as they must do in some measure on the language of certain statutes, as in the case of Rex v. Blackman, I Esp. 95, and Rex. v. Cole, 2 Esp. 167, when Lord Kenyon, reviewing his own opinion in the former case, decided differently in the latter on the effect of the same statute, in rendering the witness competent. These cases however, as well as that of Heward v. Shipley, 4 E. R. 180, and Rex v. Williams, 9 B. & C. 555, are not, as I conceive, cases intended to be decided in opposition to the general principle of law. They are grounded upon distinctions drawn from the particular language or apparent intent of the legislature in the several cases.

The foundation for some of these exceptions has not been considered as resting on clear grounds; but no one of the cases has gone the length of overturning the general principle of law, which is still clearly recognized and constantly acted upon, and which is stated in very clear and positive terms in all books of evidence, namely—that a person who is entitled by aw to a share of a penalty when recovered, cannot be a witness for the prosecution on an information, or in an action brought for the recovery of that penalty. I refer to Gilbert's Law of Evidence, III, II3, I28; to Mr. Starkie's Treatise on Evidence, I vol. 157, note; 2 vol. 12; 3 vol. 851, note; and to Roscoe, Evidence in Criminal cases, I31-2.

There are some statutes which hold out inducements to "informers."

(using the term in its invidious sense) to disclose transactions of which, from their connection with them, they have peculiar knowledge, and which from being generally secret in their nature, could scarcely be detected unless some one who has been concerned in them will consent to give information. Such are the statutes against gaming and against bribery; and in regard to these cases, it has been considered by the court, that if the evidence of the informer should be excluded, the very intent of the legislature would be defeated, since it would be idle to hold out a reward to an informer in case of conviction, and at the same time to disable the crown from making such use of the information as can entitle the party giving it to the reward.—Heward v. Skipley, 4 Ea. 180, and Bush v. Ralling, Sayre, 289, were cases of that kind, and were therefore held to form exceptions to the rule.

But the case of this witness is not of that description. He is a public officer merely promoting a prosecution for an alleged infraction of the law. He is not in any other sense an informer. The penalty is given to quicken his diligence, not to induce him to divulge any secret fact of which he has been allowed in confidence to acquire a knowledge, or in which he has been an accomplice. If this case does not come within the general principle—there can be no such principle—nothing but an express provision in a statute, such as the British act for prevention of smuggling, 8 & 9 Vic. ch. 87, sec. 132, can make him a witness; and no enactment of that nature has been pointed out to us, and we know of none that we can apply to the case of a suit for a penalty in this province.

It only then remains to inquire, whether the witness, Dixon, was clearly a person entitled to a share of the penalty, in the case in which he was called. The provisions of the statute of Canada 10 & 11 Vic. ch. 31, if that could have applied to the case, which it clearly cannot, for the reason I have stated, would enable the government to give a share of the penalty "to any person having given information, or otherwise aiding in effecting "the condemnation, of the vessel or goods seized, or the recovery of the pen-"alty." That is very comprehensive as to the person to whom a share of the penalty can be given, but it would probably not be held to disable any one from giving evidence, because it is to depend on the mere discretion and pleasure of the government, whether the person gets any thing or not. The 8 & 9 Vic., ch. 93, sec. 89, which governs this case, is very differently expressed. It directs that one third of all penalties and forfeitures recovered shall be paid to the collector of the port for her Majesty's use, one third to the Governor, and the other third part to the person who shall seize, inform and sue for the same.

Now in this information, no mention is made of this officer of customs, Dixon; he does not stand there as the person either informing or suing, the word seizing, is of course only applicable to cases of prosecution for condemnation of the goods. It is laid in the information, that Mr. Kirby, the collector of customs at the port of Fort Erie, elected to sue for the £100 penalty, rather than for the treble value. The 66th sec. of 8 & 9 Vic., ch. 93, provides that the election shall lie with the officer of the Customs, and that the averment in the information for the recovery of any penalty, that the officer proceeding has elected to sue for the sum

mentioned in the information, shall be deemed sufficient proof of such election.

The difficulty then with me is, that Mr. Kirby the collector stands in the record as the person *proceeding* to recover the penalty, and therefore entitled to make the election; and this being so, I do not see how we can treat this witness Dixon as the person informing and *suing* for the same, and on that ground entitled to a share of the penalty under the 8th clause.

He believed himself entitled, as he swore; but I do not see his title under the act. The collector, it seems to me, is here suing for the penalty in the name of and through the Attorney-General.

My brothers concur in this view of the case, and the rule is therefore made absolute for a new trial without costs.

Per Cur.—New trial without costs.

PRESCOTT V. JARVIS, SHERIFF HOME DISTRICT.

A plaintiff allowing the defendant's witness to be examined and cross-ex amined, cannot afterwards object to his competency—upon grounds known to the plaintiff and the court, before the witness went into the box. Semble—that the case of Jacobs v. Layburn decides nothing more than this; that an objection to the competency of a witness is always in time, if made as soon as the interest is discovered.

Case against the defendant as sheriff, for a false return, setting forth, that plaintiff had obtained a judgment and fi. fa. against one Alexander McClenaghan, and delivered it to this defendant to be executed; that the defendant in the fi. fa. had collusively given a fraudulent confession of judgment to one Thomas McClenaghan for 800l. damages, in order to defeat the plaintiff's claim; that this defendant levied on Alexander McClenaghan's goods, being sufficiently to satisfy the plaintiff's writ, but that although he had notice that the other judgment was fraudulent, he paid the money over to Thomas McClenaghan, and falsely returned nulla bona to this execution.

Defendant pleaded, 1st. General issue.

andly. That he did not levy on this plaintiff's writ.

3rdly. That Thomas McClenaghan's judgment was for a debt justly and truly due, and was not fraudulent.

On the trial, the plaintiff gave no evidence that could be relied on for shewing that the judgment was fraudulent; and if the case had stopped there, there was no ground on which the jury could have assumed it to be so. The defendant then called Thomas McClenaghan, who was per mitted to be examined in chief, without his admissibility being questioned. The plaintiff's counsel cross-examined him, and in answer to some of his first questions, the witness said that he had desired the sheriff to execute the writ, and that the sheriff having the goods of the execution debtor appraised, and finding them insufficient to cover the amount o' his writ, assigned them to the witness at their appraised value. The plaintiff thereupon objected that Thomas McClenaghan

was incompetent from interest. The learned judge over-ruled the objection, because it was taken, as he considered, too late, under the circumstances. The witness's examination proceeded, and his evidence was given to the jury, who gave their verdict for the defendant.

Bell moved for a new trial on the law and evidence, and for misdirection.

7. Lukin Robinson shewed cause.

The authorities cited in the argument, were—7 Jurist, 562; 2 Moo. & Rob, 105; Ley v. Madill, I U. C. R. Robinson v. Rapelje, 4 U. C. R.; I Esp, C., 37; Holts, N. P., 314, 485; I T. R. 719; 4 Burr, 2256; 7 Bing., 564; 9 Dowl. 143; II M. & W. 273, 685.

ROBINSON, C. J., delivered the judgment of the court.

Upon reading the evidence, it is quite clear that there should be no new trial.

If Thomas McClenaghan had not been called, the jury would still have had no ground whatever afforded them by the evidence for finding otherwise than they did, unless it would have been proper in them to have assumed that one brother could not owe the other a debt, and that the judgment must be necessarily fraudulent, though they had no evidence to impeach it. But they had no such arbitrary discretion, without some circumstances of suspicion being in proof; and there really were none adduced, from the beginning to the end of the plaintift's case, on which the jury could have relied.

Thomas McClenaghan's evidence, to be sure, did shew on the other hand, if he could be believed, that all was perfectly fair and just, and his account is on the face of it not only credible, but very probable: and when it must be admitted, that if it were all struck out, still the plaintiff had given no evidence in support of his declaration, alleging the judgment to be fraudulent, there can be no doubt that the verdict must stand, whatever we might think of the admissibility of Thomas McClenaghan's claim.

When I say there was no evidence given by the plaintiff which would have warranted the jury, if the defendant had called no witnesses, in finding the judgment to be traudulent, I mean that Evans's account of what he heard Alexander McClenaghan say, as it is explained by him in the conclusion of his evidence, amounts only to this-that he heard Alexander McClenaghan, when the landlord's agent was anxiously inquiring about the means of paying their rent, say that he had made such arrangements as would preserve the goods to Thomas McClenaghan in satisfaction of his debt, or in security for it, which of course he might do-and then the execution of other creditors could not sweep them away; while they remained on the premises, they would of course be answerable for the rent. That they were assigned as a security for the debt pretended only to be due, or that they were only prktended to be assigned, is not what Evans stated Alexander McClenaghan to admit No doubt that may have been the case, but Evans did not swear that he knew anything to that effect himself, or that what Alexander McClenaghan said to him was to that effect; and if his evidence did not amount to that, there was no other evidence watever to impeach the deed.

No doubt arrangements of this kind are often made for fraudulent purposes, and especially among relations; but before a judgment can be set aside as fraudulent, there must be something to throw suspicion upon it—something beyond the mere surmise that it must have been fraudulent because the plaintiff and defendant were brothers, otherwise one brother could hardly venture to accommodate or relieve another by lending him money or otherwise, if it is to be deemed incredible that he can have had actual dealings with him.

If it had been shewn here, as it sometimes is in such cases, that the brother who took the judgment or assignment was so young a man, or in such circumstances that he had no visible means of making the other his debtor to any such amount, that would have been something; but there was no such evidence—nothing but what Evans heard Alexander say, that the property had been made secure to Thomas, and as he understood for an actual dealing they had had together.

That a debtor may secure or pay one creditor to the exclusion of others, cannot be doubted; but it always is a question, whether the transaction was real or merely colourable; that is a question to be determined upon evidence of facts, and of the declarations and conduct of parties.

But as to the admissibility of the evidence of Thomas McClenaghan—he was plaintiff in the judgment complained of as fraudulent. That was known when he was called; and if without more being said or known, he was necessarily incompetent on that general ground unless released, then the exception should have been taken when he was called, and at least before he had been examined and cross examined.

That an objection to the competency of a witness is always in time, if it is made as soon as the interest is discovered, is all that was decided in Stone v. Blackburne, I Esp. 37, and nothing is more reasonable. Nothing more was decided in Jacobs v. Layburn, 11 M. & W. 685, though Lord Abinger, in the course of his judgment, expresses himself in such a manner as may lead us to think that he conceived it an admissible course in a counsel to let the witness proceed in his evidence, in the hope that his testimony would be favourable to him, and then when he found it to be otherwise, that he might except to his competency on grounds known to himself, and equally so to the court, when the witness went into the box. The weight of authority is against that, and I have seen no decision that supports it; and looking at the case as reported in 7 Jurist, 562, I believe that Lord Abinger meant nothing more than that the counsel being aware of an interest which rendered the witness incompetent, might delay bringing that fact out by cross examination till he chose, and that when he did bring it out, he would be entitled to

I think therefore that if this witness were incompetent merely on the general ground, because he was plaintiff in the first fi. fa. the plaintiff

waived the exception on that score by acquiescing in the examination, and cross-examining him in relation to the judgment, and to his own conduct in respect to it. That he was incompetent on that general ground, I am not yet satisfied, for he has received his debt; the event of this action could not directly affect him; and whether he would be liable to refund in an action brought against the sheriff is the question, and it is one which the case in this court, of Ley v. Madill, cited is the argument, does not determine, because in that case the sheriff had not been apprised that the judgment was impeached, and the action, moreover, was not brought by him.

It is true McCleneghan said, in his cross examination, that he had desired the sheriff to proceed in the execution, and that he had taken from the sheriff a bill of sale of the goods under the \mathfrak{fl} . fa. So far as that went it was a ground of exception, not arising from the mere fact of his being plaintiff in the \mathfrak{fl} . fa., but from his conduct in the matter. But the deputy sheriff had already stated the fact that he had made over the goods to Thomas McClenaghan, and the plaintiff's counsel knowing this, yet allowed the witness to go through his whole examination in chief without exception; and I do not consider that he could afterwards exclude the witness on that ground.

But if Thomas McClenaghan's evidence were all struck out, it would be impossible, in my opinion, to say that a verdict against the sheriff, on the the ground that the first jndgment was fraudulent, could be said to be supported by evidence, or still less, that a verdict in his favour as this is, could be held to be against or without evidence.

Per Cur.—Rule discharged.

DOE HARE & McDAVITT V. POTTS.

Provincial statute—59 Geo. 3, ch. 14, sec, 12.—Under what circumstances the defendant in ejectment can claim compensation for his improvements, before he can be dispossessed under the judgment.

The question in this case was upon the proper application of the 12th clause of our Survey Act, 59 Geo. 3, ch. 14; which provides "that if any "ejectment shall be brought against any person, who after the (side) lines of "his land shall have been established by virtue of that act, shall be "found, in consequence of unskilful surveyors, to have improved on land "not his own, it shall be lawful for the judge of assize, before whom such "action is tried, to direct the jury to assess such damages for the "defendant, for any loss he may sustain in consequence of any improvement "made before such action is commenced, and also assess the value of the "land to be recovered—and if a verdict shall be found for plaintiff, no "writ of possession shall issue until such plaintiff has tendered or paid "the amount of such damages as aforesaid, or shall release the said land "to the defendant, provided the defendant shall pay or tender to the "plaintiff the value of the land so assessed before the fourth day of the "ensuing term."

The facts, and arguments of counsel, are fully given in the judgment of the court.

Robinson, C. J., delivered the judgment of the court.

In the case before us, the defendant, the owner of lot 25, about twenty years ago, had the division line between that lot and 26, run by a person not then a licensed surveyor—but accustomed to make surveys, and who some years afterwards received a license. The person so employed finding a front post between 25 and 26, on the ground, which this defendant told him was an original post, adopted it as such, and ran the line from it. In point of fact, as I gather from the evidence, this was not a post planted in the original survey, but had been planted by one Ryder, and as I also infer from the evidence, many years after, though the person who ran the line for the defendant swore that it was then supposed to be the original post; and other witnesses examined at the trial, swore that they had formerly so considered it.

This then is the case of a proprietor of land trusting to a survey made since the statute 59 Geo. 3, ch. 14, by a person not a licensed surveyor, and settling according to a side line so run; and it turns out that the person applied to, fell into an error by adopting that as an original post set to mark a front angle of the lot, when in fact it was not a post planted in the original survey. The first question is, has the defendant a claim under the statute to be paid for improvements made by him in reliance upon such a survey?

The second clause of the statute makes the post that have been planted at the front angles of any lot in the first survey, "unalterable boundaries of such lot."

The 5th clause provides, "that no person shall act as a surveyor of land, until he shall have been examined by the Surveyor-General as to his fitness, and obtained a license, and taken an oath of office prescribed by the statute"—and the rith clause points out the process by which a surveyor so qualified and licensed, shall ascertain and establish the division line between any two lots of land in the same concession. First, it points out how he is to ascertain the point of departure if the post set at the first angle of the two lots in the original survey be not still standing, and next upon what principle he is to run the division line, from such ascertained point of departure. In both of these respects, the statute sanctions, in certain cases, a departure from the plan or principle of survey which the patent might have made it proper to adopt, if no such statute had been passed. This is done with a view to make the arrangement of the lots in the several concessions uniform, and at the same time to do, as far as may be practicable, equal justice to all.

* But to attain those objects, the statute compels surveyors, in some cases, where the original posts have perished, to fix and adopt points of departure different from those which could have been assumed by a surveyor, so long as he was bound to adhere to the terms of the description contained in the patent, by which the proprietor held his land; and so also in running the division line from any ascertained point of departure,

the course set down in the patent is to be disregarded if it does not happen to agree with the actual course of the part of the side line of the township, subtending the particular concession in which the division line is to run—that side line, I mean, from which the lots are numbered.

It has often happened that the Township line has not been run on one uniform course, through all the concessions, though it must have been intended to be so run, and in other cases the township line may have varied, not merely in parts, but wholly, from the course marked in the diagram, from which the patents were framed. But for the sake of making the lots in each concession range uniformly, the legislature thought it expedient to take the actual course of the exterior side line of the township, as marked upon the ground at the end of each concession, for the standard—and to provide that the side lines of all the lots in the same concession shall correspond with that, whether the township line, as laid out on the ground in the original survey, was run on the proper course, or not.

Yet it would seem obvious that whenever these new principles of survey could not be carried into effect without disturbing the occupation of parties who had taken possession agreeably to the terms of their patent, before this statute was passed, it would not be just to allow such possession to be interfered with without compensating them for their improvements.

It has often appeared to me, in considering the 12th clause of this statute, that the Legislature probably meant no more by it than that; and that there would, therefore, be no room for the application of the clauses except in cases where a party has settled conformably to the origina, survey, which proves to be erroneous when surveyed according to the general rules laid down by the statute.

It may be said that when a surveyor engaged by a party to run a division line, had run it through before the statute, according to the course laid down in the patent, such line cannot be properly called erroneous because it does not also conform to the actual course of the township line, by reason of the latter having been unskilfully run. Yet it is true that the intention of the original survey always was, to make all the side lines, including the township lines, run on the same course. When they do not, the survey may be properly called an unskilful one; and the method which the Legislature has taken for correcting it, is to adjust the whole by the actual course of the township line, whether that be right or wrong.

There is much ground, I think, for holding that the Legislature intended only to protect parties who have settled according to origina surveys, made before the statute was passed, which, when tested by the principles laid down by the statute, do not prove to be in conformity with them.

On the other hand, it may be contended that the words of the 12th clause are large enough to comprehend surveys made after the statute, as well as before, and surveys not merely erroneous, because they differ

from the rules prescribed for the first time by the statute, but also surveys which would at any rate have been erroneous if tested merely by the original plan of survey. The act is a remedial one founded on principles of equity, and parties therefore may claim to have it liberally construed.

Without at present determining this point, which, I confess, I should desire to see made clearer by an amendment of the law, this much, at least, is in my opinion plain, that a defendant in ejectment cannot claim the benefit of this clause by reason of his having relied upon a survey made after the passing of the act by any other than a licensed public surveyor.

If no person can act as a surveyor of land in this Province, who has not been duly examined and licensed and sworn, and it is certain that he cannot without violating the express words of the 5th clause of the statute, then, in my opinion, a survey made by any person who has neither been examined, nor licensed, nor sworn, ought not to be recognized by us as a survey, on the faith of which a proprietor of land has a right to settle, and by which he can claim a right to hold, whether it be right or wrong, till he has been compensated for any improvements which he may have chosen to make.

In the case before us, it is conceded on both sides, that there was no material error committed by Mr. Elmore, in regard to the *course* of the division line which he ran; but he adopted a starting point so far removed from what turns out to be the true one, that the effect of his survey would be, to take from the owner of lot 26, 35 or 40 acres of his land, and give it to the defendant, who has his full compliment of land without it.

The defendant had his survey made after the statute 59 Geo. 3, ch. 14, was passed, and therefore at a time when the principles of that statute ought to have been applied. According to that statute, the front angles were to be determined by posts or monuments planted in the original survey, and still remaining on the ground of which the public licensed surveyor was to judge by inspection, or to be ascertained when these have perished by evidence of their precise position; which evidence a public licensed surveyor alone is authorized to take, and on which alone he has jurisdiction to determine.

Whatever may be the case where a public licensed surveyor, employed by a party, misleads him by an erroneous survey made since the passing of the act, it is clear, in my opinion, that when a party ventures to take possession according to a survey made by any other than a public licensed surveyor, he does so at his peril, and if, relying upon such survey, he makes improvements upon another person's land, he is liable to be dispossessed without being paid for such improvements.

I assume the present to be a case of that kind; the defendant grounding his claim to damages upon the error made by Mr. Elmore, not upon any error made in the original survey, because if the post from which Mr. Elmore started, was in truth an original monument, and not a post

erroneously assumed by him to be such, then the land in question would form part of 25; whereas, the defendant admits it to be part of 26—and to be the land of the plaintiff.

In looking at the 12th clause of the 59 Geo. 3, which this case turns upon, one is struck with the singularity of the provision which declares, that though a verdict be found for the plaintiff in an ejectment, yet no writ of possession shall issue until the plaintiff has paid the defendant the damages assessed for his improvements, or shall release the land to the defendant on being paid its assessed value. It would be rather repugnant to issue a writ of possession to the plaintiff after he has released the land to the defendant. What the Legislature meant, I suppose, was, that no writ of possession should issue, in case the plaintiff should, before the next term, release the land to the defendant, not that the writ should be suspended till he had done so,

There is much equity in the provision taken in a general sense, and it could be made always to operate justly, if there were some authority invested with a discretionary power to apply it according to circumstances. It may be sometimes applied so as to work great injustice, and therefore is not, I think, to be extended by any latitude of construction beyond its obvious import. All that I see in the evidence is, that this defendant seeing a post in the ground, pointed it out to a surveyor as the proper point of departure, and the surveyor taking his word for it, adopts it as his starting point, and from it runs a line on the proper course, it seems, for a division line between him and his neighbor. It is clear enough, however, on the evidence, that that was not a post planted in the original survey. If it were, it must govern; or if the commissioners have reestablished anything inconsistent with it, by which the defendant would suffer, he must then be said to have lost his land by neglecting to appeal against the decision of the commissioners, and from no other cause.

By whom, or in what survey and for what purpose, that post had been set there, does not appear, and I think that is a point upon which it was material that the jury should have expressed their opinion. It seems most probable that it may have been placed in the course of a survey made only with a view of proving the correctness or otherwise of the original survey, and in order to see where an equal and accurate division of the lots according to the plan of survey would bring the several posts, not with any idea of overruling the original survey, for that could not legally be done.

If made with the view I have suggested, it would be inconsistent with the truth to call it an erroneous survey, and we could not admit the right of the defendant to take a post so planted, as his guide. There should, in my opinion, be a new trial, in order to determine that point, for as the case stands, I do not see it established that the defendant was misled by an erroneous survey; and I will add that it seems to me that the jury, in allowing the sum which they did, as the compensation which the detendant should receive for his improvements, adopted the least reasonable of the opinions given at the trial.

The effect of the verdict, if carried into effect, would be to make the plaintiff pay the defendant 65l. for occupying his ground twenty years, and upwards, stripping it of its best timber and exhausting the soil, when there can be no doubt that for doing all he did, it would be just he should have paid an annual compensation as rent, instead of receiving damages. He has made no permanent improvement worth paying for, and yet the jury have placed the plaintiff in this situation, that he cannot get possession of his own land without paying the defendant considerably more for what are miscalled improvements, than they have thought proper to allow as the value of the fee simple of the very same land, in case the defendant shall think proper to buy it. And when I say we must be careful not to go beyond the plain provisions of this clause in order to extend them to cases not clearly embraced in it, it is because I cannot help seeing how unfairly it might be made to operate in a case like the present where the deefendant himself directs a surveyor to run a line from a certain point, and then adopts that as the true boundary between him and his neighbour, when it is clear that is not the true boundary. and that it would deprive his neighbour of more than 30 acres of his laed. As the jury have thought it proper to allow him 651. for cropping this land for a succession of years, we must suppose they would not have failed to allow him the full value of any substantial buildings he might have chosen to place on it; and if it had suited his convenience to put a stone house, or a mill on the encroachment, which the jury might have valued at 2000l. or 3000l., then the plaintiff could never have got his 30 acres of land, unless he was prepared to pay 2000l. or 3000l; for such is the effect of the clause, that though the plaintiff may sell, and the defendant might buy the 30 acres from him, at the price to be assessed by the jury, yet the defendant need not buy unless he pleases, and if he declines to buy, and the plaintiff cannot pay for his buildings, the recovery in ejectment would signify nothing, and the possession must continue in the defendant.

Per Cur.—Rule absolute for new trial.

Costs to abide the event.

SMITH V. ASK.

The court will not try matters on fact on affidavits. Where, therefore, the defendant moved to set aside a verdict for irregularity, because the notice of trial had not been served eight days before the assizes, and the plaintiff's attorney swore that the defendant's attorney agreed to take short notice of trial, which the plaintiff's attorney denied. Held per Cur.—that the verdict must be set aside.

In this case the defendant moved to set aside the verdict for irregularity in notice of trial, it not having been served eight days before the assizes, or for a new trial on the merits.

The verdict was for £29.

The notice of trial was clearly less than eight days.

The plaintiff's attorney swore that the defendant's attorney agreed to take short notice of trial.

The defendant's attorney denied that he did.

ROBINSON, C. J., delivered the judgment of the court.

We cannot hold the regular notice dispensed with—because we cannot try the fact on affidavits; we must therefore make the rule absolute for setting aside the verdict.

The defendant's attorney seems not to have acted very reasonably or liberally by the plaintiff's attorney in the matter; but I apprehend we cannot do otherwise than make the rule absolute on the ground of irregugularity, and it will compel these practitioners to act more regularly: and not rely upon a sort of general understanding—not to be particular, which leaves the one always at the mercy of the other.

Per Cur.—Verdict set aside.

COMMERCIAL BANK V. ROBLIN ET AL.

Indorsees against the maker and indorsers of a promissory note, under our statute 3 Vic. ch. 8: "For that whereas the said George C. Roblin, on, &c., made, &c., and the said Philip J. Roblin endorsed, &c."

Demurrer—Because George C. Roblin and Philip J. Rolin were not declared against by their proper names as given them in baptism, but merely by the initial letters of one of their first names; *Held, per Cur.*. declaration good.

Indorsees against the maker and indorsers of a promissory note, under our statute 3 Vic. ch. 8; "For that whereas the said George C. Roblin, on, &c., made, &c., and the said Philip J. Roblin endorsed, &c."

Demurrer—Because George C. Roblin and Philip J. Roblin were not declared against by their proper names as given them in baptism, but merely by the initial letters of one of their first names.

The cases cited were, 9 M. & W. 347; 3 Bing. N. C. 777; 2 D. & L. 982; 15 M. & W. 277; 2 U. C. R. 418; 3 Camph. 29; 2 Stark. N. P. C. 29; 1 Dod. 47.

Robinson, C. J., delivered the jpdgment of the court.

It is true, the Statute 3 Vic. ch. 8, gives a form of declaration which it says may be used in such cases, and that form does contain a statement of the place where the note was made, but it is not the effect of any form so prescribed to bind pariies to the exact use of every word, without regard to its materiality. The principle, that the statement of venue in the margin draws the venue after it, and that it was unnecessary to allege a place afterwards for the purpose of venue, has been long established; and the form given by our Rule of Court, made under legislative authority, and which is since the statute 3 Vic. ch. 8, following that principle, does not require any statement of the place where the note was made.

The objection that the statute is now cited, has clearly nothing in it: being a public act, we are bound to notice it, whether referred to or not

The giving the initial letter only of the second Christian name of two of the defendants is clearly no ground of demurrer, independently of the fact of the statute 7 Wm. 4, ch. 3, sec. 8, which does not even allow a plea of abatement in such cases.

Whatever advantage might be taken of any such defective manner of setting out the name of a third party referred to in the declaration, it is clear that with respect to the defendant in the suit, after he has appeared and pleaded to the action, it becomes immaterial what name he has been called by in the declaration. The only question at the trial is, as to his identity; and if before pleading he desires to correct an inaccuracy in the name by which he is sued, his only course now is, under the statute 7 Wm. 4, ch. 3.

Per Cur.-Judgment for Plaintiff.

DOE DEM. ABRAHAM MARSH v. SCARBOROUGH.

A. devised to B, his son, "a certain parcel of land, not less than 60 acres, "nor to exceed 100—bounded above the road by Mr. Mason's west line, "and to extend No. 24 west until he intersects with John Marsh," which description not being sufficiently precise to mark out any certain piece of land, he made a deed some years afterwatds, by which, for a consideration of £50, he bargained and sold to B 80 acres of the same lots of land, under a description which did mark out a certain tract, and which would includat least 60 acres of that which had been devised to B.—Held, per Cur. that the deed was a revocation of the devise to B, who could hold only such land as the deed covered.

Ejectment for part of the front of the west half of Lot No. 25, and part of the front of No. 26, in the first concession of the township of Cornwall, covering 20 acres of land.

This cause was tried at the last assizes for the Eastern District, when a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:—

In 1827, Abraham Marsh, sen'r., made his will, devising to his son John Marsh "a certain parcel or lot of land in the first concession of the town, "ship of Cornwall, known by the rear parts of the west half of Lots Nos." 25 and 26, containing not less than 60 acres, nor more than 100. And also to his son Abraham Marsh, jr., (the lessor of the plaintiff), "a "certain tract or parcel of land, not less than 60 acres, nor to exceed "100; butted and bounded above the road by McNairn's west line, "and to extend north 24 degrees west, until he intersects with John "Marsh."

In January, 1832, Abraham Marsh, sen'r., made a deed to his son (the lessor of the plaintiff,) in consideration of £50, "of part of Lots "Nos. 25 and 26, in the first concession of the township of Cornwal1" the said land being butted and bounded as follows; commencing on

"the King's highway, adjoining Alex. McNairn's property; thence "north 24 degrees west, to the property of John Marsh; thence along "the property of John Marsh, 12 chains; thence south 24 degrees east to the King's highway; thence along the King's highway to the place of beginning, containing by admeasurement 80 acres, more or less."

In addition to the will and deed, there was the affidavit of Alex. McNairn, who swore that deponent was well acquainted with Abraham Marsh, (senior,) the father of the above named lessor of the plaintiff, and that the said Abraham Marsh, sen'r., in a conversation which he had with deponent in the summer of the year, 1831, stated that he intended to give his son Abraham Marsh, the said lessor of the plaintiff, a deed for a part of the property in the township of Cornwall, on which the said Abraham Marsh, sen'r., then resided; that the said Abraham Marsh, sen'r., afterwards in the course of the same conversation, stated to deponent that he had made a will whereby he devised to his son John Marsh, a certain part of the said property, to be not less than 60 acres nor more than 100 acres in extent; and that by the same will he devised to the said Abraham Marsh, an equal quantity of land: that the same Abraham Marsh, sen'r., stated in the same conversation, that he intended to make the said Abraham Marsh equal with the said John Marsh.

Also, of Catherine Marsh, who swore, that before the deed to Abraham Marsh, to the lessor of the plaintiff, was made by the said Abraham Marsh, sen'r., the said lessor of the plaintiff requested said Abraham Marsh, sen'r., to give him the said portion of Lot No. 26 on which he had built his house; that the said Abraham Marsh, sen'r., refused to give him the same, saying that he had given him part of Lot No. 25, and that he intended Lot No. 26 for others; subsequently, at the request of this deponent, he gave to the lessor of the plaintiff, the portion of land he asked for, being the part of 26 included in the said deed; that the said Abraham Marsh, sen'r., died in the month of May, A. D. 1833.

Also, of William S. Barnhart, who swore, that deponent has often heard the lessor of the plaintiff say, before and since his father's death, that he was satisfied with the quantity of land his father had given him by deed, and that he was better off than his brother John, because if he had not as much land he had a title for what he had got. That after the death of Abraham Marsh's father, deponent helped said Abraham Marsh to put up a fence on the western boundary of the part deeded to him, and that said Abraham Marsh at that time spoke of the said fence as being the western boundary of his land, and the line between him and Mrs. Marsh, who claimed, under the will, the premises now in dispute; that at the date of the will, the land in dispute was partially cleared and used as pasture, but was uncultivated.

Also, of John Wright, who swore, that in the course of the spring previous to the date of the deed given by the late Abraham Marsh to the lessor of the plaintiff the said lessor of the plaintiff, in a conversation with deponent, stated to deponent that he had told his father, the said late Abraham Marsh, sen'r., that if he would give him a deed for 80 acres of land he would be content with it as his portion, and would not look for any thing more, and would look no more about the will; and that in a conversation with the lessor of the plaintiff, about a year ago, after the lessor had taken possession of the disputed premises, deponent

reminded him of the above conversation, and the said lessor of the plaintiff made no reply.

Upon the above will, deed and affidavits, the questions to be determined by the court were, 1st. Whether the will would in fact entitle the lessor of the plaintiff to the 20 acres which he claimed, if nothing had been done since the will was made which could affect the devise.

andly. If it would, then whether the deed afterwards made to the lessor of the plaintiff had the effect of limiting him to the land which it covers, and which he has taken possession of and enjoyed under the deed?

Brough for the lessor of the plaintiff. The will clearly embraces, or is capable of being so construed as to embrace the 20 acres claimed, and it cannot be the effect of the subsequent sale to the devisee of a part of the same land, to revoke the devise to him of the remainder.

Whatever the devisor may have meant, we can only look to the legal effect of the deed made under such circumstances, and cannot receive parol evidence as to whether an ademption of the devise was intended or not. He cited 5 B. & Ad., 129; 2 Barnard's Repts., 178; 5 Maddox, 22

Vankoughnet for the defendant. The will being uncertain as to the extent of the tract intended to be given, the deed must be regarded as being made for the purpose of defining it and limiting the possession to that certain portion; and if the will would cover any land not embraced in the deed, it must be considered as revoked.

If the devisee had a right to elect whether he would take 60 or 100 acres under the will, he has allowed fifteen years to pass since the death of his father without shewing any intention to claim more than the 80 acres which the deed covers; and so he must be looked upon as having chosen only to take those 80 acres, and cannot at this distance of time make an election to have more than he has hitherto enclosed and possessed. He cited 2 P. Wm. 334; 7 M. & W. 580; 2 Q. B. R 181, 256; 9 Ves. jr. 519; 1 Roper on Legacies, 318; Atk. 427, 3 Hare, 316.

ROBINSON, C. J., delivered the jukgment of the court.

The defendant is in our opinion entitled to our judgment.

The deed made on the 24th January, 1832, to the lessor of the plaintiff, by his father, clearly entitles him to all the land embraced within a line drawn 12 chains westerly from McNairn's line and parallel to it, and bounded on the north by the southern boundary of John Marsh's land, wherever that may be, and on the south by the highway. This land, it appears, the lessor of the plaintiff has inclosed; and it is stated in the evidence to contain 80 acres, which is the quantity the deed professes to convey.

He now claims a right to go so much farther to the west, as will give him 20 acres in addition to the 80; and this action is brought to establish that right.

He connot claim this additional land under the deed from his fatherbecause that expressly limits the tract conveyed, to the distance of 12 chains west of McNairn's line; in that respect, at least, it is precise. But he claims a right to the additional 20 acres, in order to make up his quantity to 100 acres; because his father, who made the deed in 1832, had in 1827 made a will devising to him, as he contends, 100 acres of these lots, 25 and 26, which will was uncancelled and not revoked.

The questions, then, are, whether the will would in fact entitle him to the 20 acres which he claims; if nothing had been done since the will was made, that could affect the devise.

And 2ndly. If it would, then whether the deed afterwards made to the lessor of the plaintiff, has the effect of limiting him to the land which it covers, and which he has taken possession of and enjoyed under the deed?

First. What does the will made in 1827 give to the lessor of the plain. tiff? That seems to depend on what John Marsh would take under the same will, which is most inartificially drawn. It does not devise to John Marsh any tract of land certainly described, but only "the rear "parts of the west half of 25 and lot No. 26, in the 1st concession, con-"taining not less than sixty acres, nor more than one hundred." If the will had given a certain number of acres to John Marsh, of the rear parts of these lots, it might perhaps have been held, that he would have had an election in what manner to take them out of the rear part (that is, according to what figure); for when by a will two acres out of four were devised, without saying which two, there the devisee was held to have an election (Dyer 281): or it might have been determined, perhaps, that "sixty acres of the rear part of the two lots" meant certainly as much of the rear part taken evenly off the two lots ns would make sixty acres; for such a tract only could in strictness be called the rear sixty acres.

The peculiarity of this devise is, that it gives to John Marsh no certain quantity of land, nor any certain close or piece of land without reference to quantity, but "the rear parts, containing not less than sixty, nor more than one hundred acres." If it could be shown that a certain part of the lots 25 and 26, whether separately enclosed or otherwise, had been commonly called the rear part of the lots, then the testator might be supposed to be devising something known by that particular designation; and then the words "containing not less than sixty acres, nor more than one hundred" would be considered as merely descriptive of what the tract devised by that name was supposed to contain. But not seeing this, we can only hold that the will has devised to John Marsh not less than sixty, nor more than one hundred acres of the rear parts of the two lots; and the question arises, whether he could elect under such a will to take sixty or a hundred acres, or any quantity between; or whether the devise would be void for uncertainty, or would be restricted to sixty acres, upon the principle that there could be no election exercised to the prejudice of the heir, who could only be deprived of his inheritance in that which wa certainly devised.

But this case does not seem necessarily to bring up this question, for it appears to be conceded that the boundary of John Marsh's land to the southward is not uncertain; and then we are to consider that however that boundary may have been settled, the devise to Abraham Marsh is "of a certain tract or parcel of land not less than sixty acres, nor to "exceed one hundred, butted and bounded above the road by McNairn's "west line, and to extend north 24 degrees west, until he intersects with "John Marsh;" and then the testator adds, "what remains of the west half of lot 25, together with lot 26 below the road, it is to be left for the "support of Mrs. Marsh, together with what shall fall to her share above "the road, including all the farming utensils."

As no land is devised to his wife, above the road, I suppose he meant by these words, that she was to have all below or south of the road as devisee, in addition to the interest she would have by law (namely her dower) in all that he had devised which was above the road; and so it would appear that Abraham Marsh was intended to take all the land above or north of the road which had not been devised to John. But I am not satisfied this was his meaning; we can only guess at it. If the will can only be taken to devise an undefined quantity of land between the road and the estate to be vested in John Marsh, provided it shall not be less than sixty acres, nor more than one hundred acres, then the same questions would occur as I have stated with regard to the first devise, and my opinion at present is, that if the devisee could take any thing under such a devise, it could only be sixty acres. If so, then the lessor of the plaintiff cannot claim more under the will than he already has.

But if this were otherwise, then how would the devise be affected by the deed made by the testator to the same person, Abraham Marsh, of eighty acres of the same land, and made in 1832, more than four years after the will was executed.

That deed of bargain and sale conveys to him for a consideration of 60l., part of lots 25 and 26 in the first concession of Cornwall, "commencing on the king's highway adjoining Alexander McNairn's property, then north 24 degrees west to the property of John Marsh (which the testator, in making this deed, thus speaks of as a known tract of land), thence along the property of the said John Marsh 12 "chains, thence south 24 degrees east to the king's highway, thence along the king's highway to the place of beginning, containing by admeasurement eighty acres, be the same more or less.

No notice is taken in this deed of any intended devise to Abraham, but the testator professes to be selling to him eighty acres for 50l. There are indeed affidavits placed before us which seem to shew clearly enough that the grantor in this deed meant to settle by it what portion of his estate his son Abraham should have, which he had left uncertain by his will; but on the principles maintained by Mr. Justice Heath, in Goodtitle v, Otway, 2 H. Bl. 525, we could not admit this kind of evidence

to explain or contradict the effect of the deed, that is its legal operation upon the will. And I take this conveyance made after the will, to the same person who would otherwise have taken the same property by the will, to be *ipso facto* a revocation, for it shews a clear intention that the disposition made by the will should not stand.

The testator had given, as I conceive, by the will, to Abraham, all the land between the road and John Marsh's land, so far as regarded the length of the tract or its boundaries north and south, but he left it uncertain by the will, how far he was to go to the west. He might go so far, certainly, as to take in sixty acres; but nothing more was certain by the will, nor could be certain till election, if there could be an election of that kind, I mean an election as to the devisee having a greater or less quantity, which is the same as if a man should bequeath to a friend not less than rol., nor more than 1000l.

At any rate, before there could be any election, and while all was within the disposition of the testator, he sells to the devisee himself a tract of land (eighty acres), which so far as it goes, must cover the very land devised. I take that to be a plain revocation of the will, not merely pro tanto, leaving to the devisee after the testator's death, an election to add to it by going to the extent of the maximum devised, that is the roo acres, as if that were still a subsisting integral devise, after a conveyance had been made so inconsistent with it. And so far as any election was necessary and could be exercised, the admitted fact of the devisee having, after the death of the testator, actually inclosed the tract granted to him by the deed, declaring the western boundary of this inclosure to be the limit of his property, is as unequivocal an election as he could make.

For these reasons we think Abraham Marsh is not entitled to the land claimed, and that our judgment must be for the defendant.

Per Cur.-Judgment for the defendant.

FERRIE V. JONES ET AL.

Semble, that the mis-recital of the title of a private act of parliament, is no ground of demurrer.

In the concluding part of a declaration against executors, it was averred: "therefore an action hath accrued to the plaintiff, to demand and have "of and from the defendants' executors aforesaid, &c." This was demurred to on the ground, that the averment should have been "to demand "and have of and from the defendants as executors." Held, per Cur., declaration goood.

In this case the only question of importance on the demurrer was, as to the effect of the mis-recital of a private act in pleading.

Other grounds, however, of demurrer were taken to the declaration, which are noticed in the judgment of the Chief Justice.

Cameron, Q. C., for the demurrer.

Vankoughnet, contra.

The authorities cited were 3 Ch. Plead. 467-8; 12 E. R. 400; 3 Campb. 53; 6 M. & S. 239; 15 M. & W. 279; 5 E. R. 150; 11 Jurist, 156; 1 G. & D. 307; 1 U. C, R. 418; 2 U. C. R. 103, 164, 395.

ROBINSON, C. J.—I see nothing in the exceptions taken to this declaration which should lead us to adjudge it to be insufficient.

It is objected, that the title of the act is mis-recited; and so it is by the erroneous addition of two words in the title, which however do not alter the sense; but in Chance v, Adams, I Ld. Ray. 77, it was decided that the title, being no part of the act, may be rejected as surplusage, and that a variance will not be fatal. The same doctrine is supported by many old decisions—Hardress, 354—and is still recognized—I Gale & D. 373; though it seems to be rather inconsistent with the principle, that variances in matters of description are fatal.

The declaration shews sufficiently, that the defendants are sued in their representative character upon a deed of their testator, and is conformable to precedents in similar cases. It appeared to me at first, that the statement in conclusion, "therefore an action hath accrued to the plain-"tiff, to demand and have of and from the defendants, executors aforesaid," &c., ought to have been rather (as the defendant's counsel has contended) to demand and have of and from the defendants as executors aforesaid, &c.; but this declaration pursues the common form in that respect.

Another exception taken was, that the declaration did not shew but that the plaintiff was charging the defendants in respect of money received by whiting before the testator gave the bond. If this were so, the exception would be good; but the declaration is not open to the objection; it states that Whiting, though appointed before the bond was given, only entered upon the duties of his office on that day, that he continued in office two years, that during all that time he received monies. &c.; and that while he continued in the said service, viz., on 1st May, 1833, and on divers days between that time and the commencement of this suit, he received monies. The bond is said to have been made 30th April, 1830.

With respect to the other objections, which turn upon the effect of the statute 7 Vic. ch. 59, I am of opinion that the act is as much binding upon the courts in Lower Canada, the language being general, and the authority of the legislature extending equally over both portions of the province. This effect too, of allowing the present chairman to sue upon a bond given to Mr. Shuter, by name, comes within the scope and intention of the act, because, though it may be true that there would be no impediment in the way of Mr. Shuter bringing an action upon this bond made to him in his individual name as obligee, yet without such a statute his successor could not have maintained an action, though that evidently was the design and object of the bond, and an object which the legislature have agreed to facilitate, Then Mr. Whiting being agent for Montreal, and the bond given by him there to the chairman of the committee, at Montreal, was properly given, and can, under

the act, be sued upon by Ferrie, whom the act recognizes as the chairman now in office.

The breach it appears to me, is clearly sufficient, for it alleges that Mr. Whiting converted the money of the company to his own use. If it had been for not accounting merely, then it would have been necessary, I apprehend, to state that he did not account to Mr. Shuter, while he was chairman or to his successor; but where the breach is of this description that cannot be indispensible.

The condition of the bond is, that he shall truly and honestly apply all monies that shall come into his hands as agent; the breach is that he converted and disposed of the money of the company to his own use; but at any rate, there is otherwise a sufficient breach charged, for the condition is that he should account to Shuter and his successors in office, whenever thereunto required; and the breach is, that though this plaintiff, as Shuter's successor, required him to account, laving this a special request, yet that he did not render such account.

DRAPER, J.—I should have felt some difficulty in deciding this question of the misrecital of the title of the statute, on the authority of Chance v. Adams, 2 Salk, 609, which is so expressly over-ruled in Mills v. Wilkins, 6 Mod. 62; and though in the recent case of Nixon v. Hanney, Esq., Holt 662, Chance v. Adams is referred to as an authority, the judgment of Lord Holt over-ruling it, does not seem to have been referred to, and is not noticed.—I Q. B. 747.

In this case, however, the misrecital is not pointed at as a cause of demurrer, and it has been decided, that though a private statute be misrecited in pleading, the court must take it to be as recited, unless it is denied to be so by pleading nul tiel record, or shewn to be otherwise by alleging how it ought to have been recited. I refer to Ld. Ray, 382; Platt v. Hill, 2 Mod. 241, and to Bech v. Beverley, II M. & W 845.—See also Sid. 356.

This objection being thus got over, I am of opinion that judgment should be against the defendants.

MACAULAY, J., and NcLean, J. concurred.

Per Cur.—Judgment for plaintiff on demurrer.

GOULA V. CARR.

Under special circumstances, verdict for the plaintiff set aside for irregularity, in not giving due notice of trial, but without costs.

Trover for pine timber.

Plea, not guilty,

2ndly. Goods not the plaintiff's.

3rdly. Plaintiff not possessed of the goods.

The plaintiff proved, that one Rennie had bought some standing timber from the defendant, at a price agreed upon, and that he, the plaintiff, having bought out Rennie, the defendant consented to receive payment from him, and let him take the timber; that nevertheless, after the plaintiff had been at the expense of making and drawing out the timber, and after had paid the defendant part of the price and tendered the remainder, the defendant sold the timber to a third party, who took it away,

Verdict for the plaintiff, 981.

No defence was made at the trial.

Dalton, for the defendant, moved for a new trial on affidavits, setting forth that George B. Hall, Esq., was the defendant's attorney; that in December, 1847, he was appointed to be judge of the Colborne District Court, and of course then ceased to be a practising attorney; and that no notice of trial in this cause was ever served upon Mr. Hall, or upon him the defendant; that notice of trial was served on a clerk of Mr, Forrest, an attorney, on the 16th October; the assizes for the district commencing on the 23rd October, and Mr. Forrest swore that he left the notice for the defendant at a shop in Peterboro, not knowing his address, and that on 17th October he wrote to the plaintiff's attorney at Cobourg, that the notice had been served on him, and that he was not the defendant's attorney.

Mr. Forrest did not state, nor did Mr. Hall, that there had been any partnership or connection in business between them as attornies; nor did Mr. Forrest state that he had in Mr. Hall's name admitted service of the notice of trial at the preceding assizes.

It appeared on the other hand, that notice of trial had been served on the 7th October, 1847, for trial at those assizes, when the record was withdrawn; that on that occasion Mr. Forrest, being a clerk in Mr. Hall's office, indorsed admission of service, signing Mr. Hall's name to it; that on Mr. Hall being made a judge, Mr. Forrest, having been in the meantime sworn in an attorney, succeeded to him in his business; that no notice of defendant's attorney being changed had ever been served on plaintiff's attorney; that the notice of trial now in question was directed to Mr. Hall, and Mr. Forrest; that though Mr. Forrest wrote to the plaintiff's attorney informing him that he was not defendant's attorney, he made no objection to the service of notice on him, nor intimated any intention to move for irregularity, either before, or at the trial

There had been no paper in the cause served, nor any occasion for serving any paper since Mr. Hall's appointment as judge, nor any proceeding in the cause since 28th October, 1847, to the time of serving this notice.

S. Smith shewed cause.

Robinson, C. J., delivered the judgment of the court.

Upon a consideration of all the facts, we think the most just order we can make, is to set aside the verdict for irregularity, but not with costs; we cannot go so far as to say that the notice of trial was regular, and cannot therefore uphold the verdict. The action is special, and it is desirable that the defence should be heard.

On the other hand, so far as regards the service of the notice of trial, there is much to excuse the plaintiff proceeding as he did, in making his service upon Mr. Forrest, who would himself have done better, considering his former connection with the cause, and his present position as regards Mr. Hall's late business, if he had made some exertion to hunt up the defendant, and with his sanction proceeded in the defence.

Per Cur.—Rule absolute. setting aside the verdict for irregularity, but without costs.

RAMSDELL V. TELFER AND Ross.

A party endorsing a note payable to A. B., or bearer, may be sued as indorser. He may also be sued jointly with the maker under our statute 3 Vic. ch. 8.

Indorsee against the maker and indorser of a note payable to bearer, sued jointly under our provincial act, 3 Vic. ch. 8.

Demurrer, because the note being payable to *bearer*, and assignable on delivery, the said John Ross, the indorser, was not bound in law by such indorsement without a special guarantee for payment -and because the parties were sued jointly as well as severally.

Ball, of Niagara, for the demurrer.

Hagarty, contra.

The authorities cited were. Tarratt et al. v. Sheldon, Scott et al. v. Douglass, in our court; Chitty on Bills, 424; I Salk. 125; Lord Ray, 744; 3 Burr. 1529; Salk. 133; Bayley on Bills, 97; Story on Promissory Notes, sec. 132.

ROBINSON, C. J., delivered the judgment of the court.

The declaration in this case is quite sufficient, being in compliance with the form given by the statute 3 Vic. ch. 8, and with our rule of court.

That a person who indorses a note payable to A. B.. or bearer, may be sued as indorser, has been several times decided in this court. The cases of Tarratt et al. v. Sheldon, and of Scott et al. v. Douglas, were cited in the argument, and there are many English authorities to the same point.

Then as the payee putting his name on the back of a note payable to bearer, may be sued as indorser, there is nothing to prevent his being sued jointly with the maker under our statute, which is not confined to notes payable to order.

Per Cur. - Judgment for the plaintiff on demurrer.

CITY BANK OF MONTREAL V. ECCLES.

Indorser against the acceptor of a bill of exchange. "For that whereas certain persons trading under the name, style and firm of Desbarats & Derbyshire, on, &c., made their bill in writing, and thereby required the defendant to pay to the said Desbarats & Derbyshire or order, &c.; and the said Desbarats & Derbyshire, then indorsed the same to the plaintiff," &c.

Demurrer: Because the said supposed drawers of the said bill were not

properly described or designated by their Christian names, neither was any excuse offered therefor; nor was it alleged that the said supposed drawers drew the said bill of exchange by the name, style or firm, in the said declaration mentioned. Held, per Cur., declaration bad.

Indorsees against the acceptor of a bill of exchange. "For that whereas certain persons trading under the name, style and firm of Desbarats & Derbyshire, on, &c., made their bill in writing, and thereby required the detendant to pay to the said Desbarats & Derbyshire, or order, &c., and the said Desbarats & Derbyshire then indorsed the same to the plaintiffs, &c."

Demurrer: Because the said supposed drawers of the said bill, were not properly described or designated by their Christian names, neither was any excuse offered therefor; nor was it alleged that the said supposed drawers drew the said bill of exchange by the name, style or nrm in the said declaration mentioned.

Small, Q. C., for the demurrer.

Duggan, contra. The authorities cited were, 12 Jurist, 980; 7 Law Jl. 407, Q. B.; 9 M. & W. 347; 15 M. & W. 277.

Robinson, C. J., delivered the judgment of the court.

We consider that the adjudged cases referred to compel us to hold this declaration bad, for the exception taken in the special demurrer.

It is the same objection as that taken in Ball et al. v. Gordon et al. 9 M. & W. 345, and under similar circumstances. The defect is the want of the allegation, that the said persons trading under the name of Desbarats and Derbyshire, did in the same name of Desbarats & Derbyshire indorse the bill.

As this is laid, it neither states the indorsement in such a manner as to make it the act of the firm, nor the act of any particular persons in their individual capacity designated by their Christian and surnames as the law requires, unless when the declaration contains some excuse for not giving the Christian names in full.

We find no case decided, that supports this form of declaration.

Per Cur.—Judgment for the defendant.

FOSTER V. MILLER.

The Replevin Act of this province, 4 Wm. IV. ch. 7, gives jurisdiction to the district court only in cases of seizure for distress.

Quære.—Can the action of repleven be sustained in any court at this day upon a mere tortious taking or detention, and in the nature of a distress?

In this case the plaintiff sued out a writ of replevin in the district court upon a tortious taking of a horse of plaintiff's, not being taken as a distress, and summoned defendant to answer, as if it were a case of replevin of goods distrained under our statute.

The defendant moved the judge of the district court to set aside the writ and proceedings thereon; and on the 27th July, 1848, on summons and the cause shewn, the judge made an order that the writ and service, and proceedings thereupon, should be set aside for irregularity, with costs.

And in this term, *Durand*, for the plaintiff, moved this court for a mandamus to the judge of the district court, commanding him to rescind the order made by him, and to proceed to the trial thereof.

ROBINSON, C. J., delivered the judgment of the court. I am clear that we should not grant the writ prayed for.

The Replevin Act of this province, 4 Wm. IV., ch. 7, on which the plaintiff's proceedings are founded, and on which alone they could be supported if at all, most clearly gives jurisdiction to the district court only in cases of seizure for distress. The seventh clause is express to that effect, and

the maxim, expressum facit cessare tacitum, applies.

I think the learned judge was clearly right, in concluding that he had no jurisdiction, and we are not to compel him to do what we see would be illegal.

Without determining, which we need not do on this application, whether the action of replevin could properly be sustained in any court at this day, upon a mere tortious taking or detention, not in the nature of a distress; or whether, if it could, the facilities given by our statute to the action, could be applied in such a case, it is sufficient to refer to the case of Shannon v. Shannon, r Sch. & Lef. 327, and the remarks made in it by the Lord Chancellor of Ireland, on such a use of the remedy, as affording sufficient ground, if there were no other, for the court hesitating to interfere by a prerogative writ in order to advance the proceeding.

Per Cur.-Mandamus refused.

JUDGMENTS DELIVERED ON TUESDAY AND WEDNESDAY, 28TH & 29TH NOVEMBER, A. D., 1848.

Present—The Hon. J. B. Robinson, C. J.
The Hon. Mr. Justice Macaulay.
The Hon, Mr. Justice McLean.
The Hon. Mr. Justice Sullivan.

The Hon. Mr. Justice Draper in the Practice Court.

BABY V, BABY.

Held, per Cur., that under the authority of the 4th & 5th Vic., ch. 10, District Councils may pass by-laws, providing that the assessment-rolls and statute labor lists, formerly prepared by the Clerks of the Peace, shall in future be prepared by the Clerks of District Councils, and that they be remunerated therefor.

Semble, however, that the Councils may, if they think proper, still allow these duties to be performed by the Clerks of the Peace—in which case,

they will be entitled to the compensation.

In this case, the question submitted for the judgment of the court was, whether the statute 4 & 5 Vic. ch. 10, gave authority to the District

Council of the Western District, to pass a by-law providing that the assessment rolls and statute labour lists, formerly prepared by the Clerk of the Peace, should, for the future, be prepared by the Clerk of the District Council, and compensation be given to the said Clerk for rendering the service.

The arguments of counsel, Cameron, Q. C. and Burns, are fully stated in the judgment of the court.

ROBINSON C. J., delivered the judgment of the court.

In our opinion, the statute 4 & 5 Vic. ch. 10, gave authority to the District Council of the Western District to pass such a by-law as they did pass on the 16th May, 1842, so far as the said by-law relates to the services which had before been required by law to be rendered by the Clerk of the Peace, in regard to assessment rolls and statute labor lists; that by-law having provided that the services therein mentioned in regard to such rolls and lists, which were formerly rendered by the Clerks of the Peace, shall in future be rendered by the Clerks of the District Councils, it follows of course, that the Clerks of the Peace can no longer charge for services which they are not required to render, and for which services the by-law provides; and that the Clerk of the District Council is to be compensated.

The Council might, if they had chosen, have allowed the matter to remain on its former footing, and then the Clerk of the Peace continuing still to perform the duties, might have claimed the compensation which the law allows for them.

This was the impression which the Judges of this court derived from examining the District Council Act, when they were framing under a late Act of the Legislature, a table of fees to be received by certain District officers, including the Clerk of the Peace: for although, in the schedule of fees, we allowed to the Clerk of the Peace certain fees for extending the rates in the assessors rolls, we were careful to add "where the service is necessary and the District Council have not provided by their by-laws for its being otherwise performed," which qualification shewed our opinion then to be, that the District Council might in their discretion make such regulations as would transfer the duties from the Clerk of the Peace to their own clerk.

There might indeed be ground for arguing that even without any specific regulation of the kind—and if the District Council Act had been entirely silent on that point—still the other provisions contained in the statute respecting the imposing and levying rates and assessments would have had that effect; for if the Clerk of the Peace, as the Clerk of the Justices in Sessions, was the proper officer to carry into effect the orders of the Quarter Sessions in regard to the amount of rate to be levied, the same principle would point out the Clerk of the District Council as the proper officer for carrying out the orders of the District Council, after the authority to impose rates, and the power to superintend their collection, had been transferred from the Justices to that body.

But the District Council Act is not silent on the point, for after giving

power to the District Councils to make by-laws "for providing means "for defraying the expenses connected with the administration of justice," for "providing a reasonable allowance for the support of schools." for "establishing a rate of commutation to be paid by each person bound "to perform statute labor," and "for the collection of, and accounting "for all tolls, rates and assessments imposed or raised under the authority "of any such Council, and of the revenues belonging to such Districts "respectively," and "for any other purpose, matter or thing which "shall be especially subjected to the direction and controul of the Dis-"trict Councils by any Act of the Legislature of this Province," the Act proceeds to provide, that "all salaries, wages and allowances of any "kind now granted to the Clerk of the Peace, for any services performed "with regard to matters hereby placed under the controll of the Dis-"trict Council, shall remain in force and effect, until it be otherwise "ordered by a by-law of the District Council." And the 45, 51, 54, 57, 60, and 62nd clauses, being read in connection with this clause, shew clearly enough the intention of the District Council Act to be, that until the District Council should provide otherwise by their by-law, all District officers who had certain duties imposed on them by law for the collection and paying over of the rates to be levied in each district, and certain fees allowed them for the performance of those duties should be bound to render the same services and be entitled to receive the same fees for such services, in respect to the rates and assessments, although they were to be thenceforward levied under the authority of the Council, but that the District Council should have full authority to make by their by-laws, such regulations as they might think expedient, for the collection of the assessments.

It is impossible that we could hold on any principle, that a by-law which makes it the duty of their own Clerk to carry into effect their own orders, is one not within their authority to pass; for it is the most reasonable, consistent, and convenient arrangement which they could make; and the probability that they would transfer such duties from the Clerk of the Peace to the Clerk of the Council, seems to be plainly contemplated in the Act itself.

The only appearance of any room for doubt on this point, may seem to be afforded by the consideration, that in what relates to the administration of justice, the District council is confined in its powers; and that jurisdiction and authority over such matters, is in general carefully reserved to the Justices of the Peace, but this distinction, though it extends to the application of such portion of the rates as may be required for those purposes, does not extend to the imposing or collecting the rates, for that is clearly to proceed under the authority and direction of the Council. The rates are all to be collected at one time, under one roll, and by one authority, and they all go into one treasury.

It would be absurd to suppose that the Legislature could have meant that, because after their collection an undefined portion of them was to be applicable to the payment of charges over which the District Council were to have no control, but the Justices only—therefore there was to be a double machinery for carrying into effect the orders of the District Council for collecting the rates; and that after the Clerk of the District Council had extended the rolls on account of the clear authority and control which the District Council has in all respects as regarded the general purposes for which the revenue is required, the Clerk of the Peace should go through the idle and unnecessary duty of giving the very same direction, and making the same calculations, because part of the rates when collected, will be applicable by order of the Justices alone.

There can be no separation of the amount of rate into two parts, one of which should be extended by the one clerk, and the other by the other, because the respective amounts are undefined and unknown.—

To pay the Clerk of the Peace for doing the same duty that has already been rendered by the other clerk, would be absurd; and to pay him the fee when he no longer does the duty, would be equally unreasonable.

The argument drawn from the fourth head of the 27th clause of the School Act, 9 Vic. ch. 20, though no doubt applicable, is not conclusive, for that clause only shews that the Legislature either at the moment omitted to consider that the duty of placing the rates on the Collectors rolls might be transferred to other hands by the District Councils, or they assumed that the Councils had left the former arrangements undisturbed—they could only have meant that the officer who directed the other rates should also direct as regards the school rates.

GUNN V. VANALLEN ET AL.

The court refused to set aside a verdict in an undefended cause, on an affidavit that the defendant's counsel was absent from inness, no attorney appearing at the trial to attend to the cause, and no application being made to put it off.

Action on promissory note of defendant VanAllen, 2nd May, 1848, at ninety days, to Benjamin Grant, or order, for 50l., indorsed by Grant and by the defendant McGregor.

VanAllen allowed judgment to go by default.

McGregor pleaded, that he did not endorse the note: and 2ndly, denied notice of non-payment.

A witness, Mr. John Askin, was called, and swore that he had seen McGregor write, and that the indorsement was in his handwriting. Proof was also given of service of notice.

The jury assessed damages against VanAllen, and found a verdict against McGregor for the note and interest, 50l. 16s. 3d.

The case was taken on the second day of the assizes, and was not defended, and though it was represented that the counsel who had been employed for the defence was absent from illness, yet no application was made on affidavit to put off the trial on payment of costs.

It was moved by Cameron, Q. C., on behalf of McGregor, that a new trial be granted, on the ground that the indorsement was not his signature, and he filed an affidavit declaring in positive terms, that he neither indorsed the note with his own hand, nor authorized any one to do so for him.

McLean shewed cause.

No cases cited.

ROBINSON, C. J., delivered the judgment of the court.

It is not pretended that due notice of trial was not given; the case was called on in its order, no application was made to put it off, and there was either an omission of the defendant's attorney to attend himself to the cause, or to have some agent on the spot to do so for him, or if there was any one representing the defendant he did not take the steps which the practice requires.

If we could properly grant relief, it could only be as an indulgence out of the ordinary course, on account of the alleged illness or detention of the professional gentleman who had been depended upon for conducting the defence as counsel, and if my brothers were inclined, under the circumstances, that the plaintiff should have a new trial on condition of his paying the costs within one month, and paying the amount of the verdict into court to abide the event of the cause, I should have no objection to concur; but upon fully considering the case, we all think it more proper that the verdict should be allowed to stand.—8 Bing. 144.

Per Cur.—Rule discharged.

PERRY V. LAWLESS.

The defendant was sued as maker of a note indorsed to the plaintiff. There was a subscribing witness to the note, who was not produced at the trial, and no objection was taken on that ground. But as the defendant had before the indorsement admitted to the plaintiff, that he had made the note and induced the plaintiff to take it—Held per Cur., that it was not necessary to prove the note by the subscribing witness, as the defendant could not be allowed to dispute his signature.

Assumpsit on a promissory note, made by the defendant, 30th August, 1847, to Kennedy Orr, or bearer, for 25l., payable in two weeks after date, indorsed to the plaintiffs. Common counts on account stated.

Pleas: non fecit, and other pleas setting up fraud in the manner of obtaining the note from the defendant by the payee.

Upon the trial, several objections were taken by the defendant's counsel, but a verdict was rendered for the plaintiff for 26l. 19s. 8d., with leave reserved to the defendant to move for a non-suit if the evidence was not sufficient to sustain the action.

There was a subscribing witness to the note, who was not produced on the trial, though attempted to be accounted for; and the defendant objected that his evidence was indispensable. Duggan, for the plaintiff, and M. Vankoughnet for the defendant, No cases cited.

ROBINSON, C. J., delivered the judgment of the court.

The verdict in our opinion should stand.

Besides that there was evidence of an inquiry after the subscribing witness, and an attempt to find him, and evidence from a witness on the trial, that he believed, or had heard, he was out of the country, the fact in this case was, that the defendant not only admitted his signature to the note, but admitted it expressly to this plaintiff, and made a distinct promise to the plaintiff, that if he would purchase the note from the payee, he the defendant would pay in a fortnight. This precludes him from now denying his signature, or from setting up fraud in obtaining the note, as a reason for not paying it to the very party who took it upon his own assurance of its validity, and on his promise to pay it. Leach v. Buchanan, 4 Esp. C. 226, is a strong authority on that point, for Lord Ellenborough there held, that although after such an admission by the acceptor of a bill, the acceptance might be proved to be a forgery, for the purpose of satisfying the ends of criminal justice, yet that the acceptor who had induced a person to take a bill by acknowledging the acceptance. must be held bound, at all events, to pay the bill to the person who had taken it in consequence.

It would be repugnant to reason, to hold it indispensable to produce the subscribing witness, when the defendant has by his admission made under such circumstauces as this was, precluded himself from disputing the note, for the identity of the note is not denied.—Stra. 846, 1051.

Per Cur.—Rule discharged.

DOE BOULTON v. FERGUSSON.

The purchaser's title to land under a sheriff's sale is *prima facie* good when the sale is made upon a legal writ; and a defendant seeking to defeat the sale on the ground of any defect in proceedings anterior to the writ, must shew clearly and conclusively that there are those defects.

The title of a purchaser at sheriff's sale is not liable to be defeated by ir regularities in the proceedings anterior to the judgment. So long as the judgment subsists in full force, it supports the execution, and the execu

tion supports the sale.

The not pufting up in the crown office a copy of the process issued against an absconding debtor, as well as the not filing the affidavit, the statute requires before taking out execution, being mere irregularities, will not have the effect of making void what was done under the execution.

Ejectment for Lot No. 12, west side of George and south of Simcoe street, in the town of Peterborough.

The plaintiff made title as purchaser at sheriff's sale under a f. fa. at his suit against one Edward Duffey, on a judgment entered in the district court of the District of Colborne.

Duffey had lived in Peterborough, and in 1840 or 1841, absconded, being in debt.

On the 1st of June, 1844, an attachment issued against him, at the

suit of the lessor of the plaintiff, in the district court, for 37l. 8s. 8d., on which this property was advertised by the sheriff, and so returned; and on the 27th of June, 1844, judgment was entered in this suit in the district court; fi. fa. issued against goods 23rd October, 1845, and returned nulla bona; and on the 28th October, 1845, a fi. fa. was issued against lands, on which this lot was sold, and a deed made by the sheriff to the lessor of the plaintiff, the highest bidder at the sale, on the 29th Dec., 1846, for 32l. 10s., the price bid.

The defendant first took exceptions to the plaintiff's title.

The plaintift's attorney in the original suit, was called and examined as to the proceedings which took place in the cause. He resides now in another district and had not his docket to refer to; but he swore that to the best of his knowledge the proceedings were all regular, and such as the Absconding Debtors Acts required; that he believed there must have been a copy of the process against the defendant put up in the crown office, as well as a copy served at the last place of abode in the district of the absconding debtor; the latter indeed was proved. He swore also that he believed there had been an affidavit filed before taking out execution, such as the 7th clause of 5 Wm. IV. ch. 5 requires.

But the clerk of the district court being also called as a witness, swore that from finding no entry in his book of any copy of process being put up in his office, or of any affidavit being filed upon taking out execution such as the statute requires, he believed that no such proceedings had taken place; he would not swear positively that they had not, but he spoke as if he had no doubt on the subject.

In the charge of the Chief Justice to the jury, he told them, that they probably would be satisfied from the clerk's evidence, that there were those defects or irregularities in the proceedings; but that if there had been, he did not consider that they would invalidate the title of the purchaser at the sheriff's sale—that he was confident they would not in he case of a stranger purchasing and for the present, should hold that they would not even when the purchaser was the plaintiff in the original action, as in the present case.

The defendant then gave in evidence a deed made by Duffey to one Bradley, on which he relied for shewing that Duffey had divested himself of the estate before even the attachment issued, and so the judgment and execution could not affect this land.

The crown had isssued a patent to Duffey for this land, on the 22nd of November. 1843, the knowledge of which probably led the lessor of the plaintiff to take out the attachment, Duffey having left the province about three years before.

The defendant produced a deed of bargain and sale, bearing date the 31st of May, 1844, from Duffey, of this lot to Hugh Bradley, for a consideration of 300l, registered on the 25th of March, 1847, the sheriff's deed not being registered till 15th April, 1847.

And next a deed from Bradley, to the defendant Fergusson, of this lot, bearing date the 30th September, 1846, for a consideration expressed of 2001., registered on the same 25th March, 1847.

There was ground for inferring from the evidence, that the deed to Bradley, dated the very day before the attachment was executed, was not in fact made till a year or two afterwards, if not longer; and that the whole transaction was besides merely colourable, with a view of defeating the title under the sheriff's sale.

The jury were told, that if the deed to Bradley was bona fide, and not merely colourable and fraudulent, and made with a view to defeat creditors, and if it was really executed before 1st of June, 1844, when this property was seized by the sheriff under the attachments, then the defendant would be entitled to a verdict, independently of the objection which had been raised and over-ruled, as affecting the title of lessor of plaintiff, under the fi fa.

There was proved on the trial, a letter from the lessor of plaintiff to defendant, written a short time before, offering (as he says he had before done) to give up the land on receiving his debt and interest, the expense of his deed and of this suit, as he had never wished to keep the land. The defendant declined these terms, and the case was given to the jury with observations upon the evidence.

They found a verdict for the plaintiff.

 $H. \mathcal{F}$. Boulton, Q. C., moved for a new trial, on the law and evidence and for misdirection.

D. B. Read shewed cause.

The authorities cited were—2 C. M. & R. 30; 4 M. & W. 578; Dyer 363; I M. & S. 425; 5 Co. 90; 8 Co. 96; I43; Cro. Jac. 246; Cro 246; Cro. Eliz. 278; I Ves. 195; Str. 755; I Pr. W. 223; Burr. 1009; 6 M. & S. 1100; Doe Hagerman v. Strong, 4 U. C. R.; Yelv. 179; Rolls Abr. 778; 4 T. R. 577; 3 B. & C. 772; 5 A. E. 86; I N. & M. 266; 9 E. R. 192; 3 Wils. 297; Cro. Jac. 108, 261; I B. & Al. 40; 2 Salk, 564; Cro. Eliz. 233; 2 Cowp. 740; I Sid. 40, 147; I Salk, 266; 2 Saund. 101, m.; 3 M. & W. 621.

Robinson, C. J., delivered the judgment of the court.

My brothers are of the same opinion with myself, that the verdict of the jury upon the question of fact submitted to them, whether the deed was executed before the 1st June, 1844, cannot be complained of as being contrary to evidence.

The impression made upon my mind by the evidence at the trial was, that the deed had been fraudulently ante-dated, and was a mere colourable contrivance, with a view to defeat the Shenff's sale, and the deed under it, which there can be little doubt had been given a good while before.

The transaction was too palpable to deceive any one, and the defendant, by advancing the deed made to him under such circumstances, instead of availing himself of the plaintiff's fair offer to take his debt and the expenses incurred, placed himself in a disadvantageous position, which I trust, the lessor of the plaintiff will be willing even now to waive.

The legal exceptions taken at the trial remain to be disposed of-and

as to these, we are of opinion that, in the first place, the title of the lessor of the plaintiff could not be allowed to be defeated upon mere assumption or probability, that all that the statutes referred to required, had not been done. *Prima facie* the purchaser's title is good when the sale is made upon a legal writ, and a defendant seeking to defeat it on the ground of any defect in proceedings anterior to the writ, must shew clearly and conclusively that there were these defects.

· 2ndly. That the title of no purchaser at Sheriff's sale is liable to be defeated by irregularities in the proceedings anterior to the judgment. So long as the judgment subsists in full force, it supports the execution, and the execution supports the sale.

3rdly. With respect to the particular irregularities spoken of on the trial, they are not such as we think could have the effect at any rate of making void what was done under the execution.

The not putting up in the crown office a copy of the summons, as well as leaving a copy at the place of abode of the debtor, could be nothing more than an irregularity; and if no affidavit, such as the statute requires, was made before suing out execution, we could not treat the sale made under the execution as void for that reason. The period here had elapsed within which the absconding debtor could have come in and contested the demand.

But on the general ground that the sale is valid, which has been made on a valid fi. fa. supported by a judgment of another court, and that a court of record, not reversed for error, we cannot do otherwise than discharge this rule.

Per Cur. Rule discharged.

DOE BECKETT V. NIGHTINGALE.

Where A had improved on the front of his lot, and laid a division fence between himself and his neighbour, so tar as his improvements extended which fence was found, upon a correct survey, to enclose part of the adjacent lots.—Held per Cur. that though the statute of limitations might bar the owner of the adjacent lot from regaining possession of the portion of his land which he had suffered his neighbour to enclose for more than twenty years, yet that would not affect the right of the latter to any other portion of his land not actually enclosed, as he could not be held to be constructively dispossessed of that portion of his lot which the erroneous fence if protracted would embrace. Held also, that while two persons are in difference about their boundary, and shew by their conduct that they are uncertain about the true line, but acknowledge the right of each other to have it ascertained, and to hold according to it, either party may make a conveyance to a third person, which will enable the alience to hold according to the true boundary—though at the time of the conveyance there might be some of his land occupied by the other, in consequence of the true line between them having been mistaken.

MACAULAY, J., dubitante.

Ejectment: In this case the lessor of the plaintiff had a verdict, and a rule was obtained by J. H. Hagarty for a non-suit, or new trial on the law and evidence, and for misdirection.

J. H. Cameron, Q. C., shewed cause. The authorities cited were—Shep. Touch. 204; I U. C. R. 151; 2 U. C. R. 270; 4 U. C. R. 223;

1 M. & Gr. and Sc. 717; 3 Nev. & Ms, 716; 2 Sch. & Lef. 65; 4 Cruise 106; Burton Real Prop. 120,

The facts of the case are so particularly mentioned in the judgment of the court, that it is unnecessary to restate them.

ROBINSON, C. J.—This is a question of boundary, the lessor of the plaintiff being the owner of a part of lot No. 7, on the west side of Yonge street, and the defendant, the tenant under one Ketchum, of lot 8, adjoining,

The lessor of the plaintiff contends that a fence which defendant has put up of late years, as a boundary between lot 8 and 7, is too far south, and encroaches on lot 7, depriving him of about six and a half acres of land. He gave evidence by two Surveyors that they had made a survey of the land; that they found the monument between lots 7 and 8 on Yonge street undisputed; that they measured from the base line intersecting Yonge street, which forms the southern side-line of No. 1 on Yonge street to the limit between 7 and 8, and then laid off an equal distance from that base line, in rear of No. 1, chaining northerly along the concession in rear of Yonge street, and thus ascertained the limit between 7 and 8 in rear, and then ran a line connecting these ascertained points in front and rear.

The surveyor did not find the true course of the base line running west from Youge street, but says it is fixed and settled, and a monument placed by the boundary-line commissioners on that base line, in rear of the first concession from Yonge street, and also on the front. The surveyor swore that his line from front to rear, between 7 and 8, is parallel to the line between these two monuments.

If that is to be taken as certainly true, then the line plaintiff relies on was run from the post between 7 and 8 on Yonge street, which is undisputed, on a course parallel with that line of the first concession from Yonge street, from which the lots are numbered; and so the statute was complied with.

In 1846 this line was run by two surveyors, with the joint assent of lessor of plaintiff and Ketchum, the owner of No. 8; one surveyor being employed by each, and Ketchum agreeing verbally to abide by the survey.

The defendant wishes, as it seems, to hold according to an old survey made by one of these surveyors some years before, when other persons were the owners of the land which the lessor of the plaintiff now holds, which survey was made by compass, and it was sworn by the surveyor that it could not be depended on, and that he so informed the party who employed him at the time; defendant gave no evidence of any survey lately made by him as the act cirects, and did not attempt to shew that the line by which he occupies, is in its proper place.

He relied rather on long possession, and contended, 1st. That plaintiff was barred by the Statute of Limitations, even if the line he now claims by, be correct.

2. That at any rate as he was in actual possession of the premises in

1844, when the deed was made to lessor of the plaintiff, under which he now claims, the land could not pass by that conveyance made by a person not in possession.

With respect to the possession, the evidence was contradictory, but the weight of euidence is against any actual occupation of the land in dispute for 20 years, by the owners or occupiers of lot 8. That point was left to the jury expressly, and they found plaintiff not barred.—Where the evidence is conflicting or doubtful, so that it cannot be said to shew undeniably a dispossession for 20 years, we should not grant a new trial in order to give a party a second chance of succeeding upon the Statute of Limitations.

As to the other objection, it seems clear that in 1844, when the lessor of plaintiff took his deed from the owner of lot 7, the land which he now claims, or some of it at least, was in the actual exclusive possession of the tenant of lot 8, being actually fenced in as part of it; but it was proved that in 1846 Ketchum, who owned the lot (8), though he contended that the division fence as it stood, was correct, yet did agree to have it correctly surveyed, and engaged to abide by the result; but afterwards, when he found that the survey showed the land not to be his, he desired to retract and hold by a former survey which was clearly not made as the law directs, and which the person who made it told him could not be depended on.

The defendant relied on the argument, upon the ground on which the court rested their judgment in the case of Doe dem. Bonter vs. Savage, 4 U. C. Repts. 223; but that case was very different in its facts from the present. There two parties who had been jointly seized of land in a town, agreed to a division, and in the deed of partition the portion intended to be assigned to one of the parties was so described, that the words defining one of the boundaries might admit of a construction which would make the effect different from what was evidently intended. The parties, however, had taken possession by mutual assent, according to their understanding of the deed, and according to its real intention, and each afterwards sold his portion. The assignee of one of them afterward brought ejectment against the assignees of the other, endeavoring to enforce a new construction of the description, and thus to possess himself of land which it was clear was never intended to form part of the portion of that party from whom he had purchased. The jury found for the defendant, and their verdict was entirely in accordance with the honesty and justice of the case. It was moved to set it aside, but the court declined doing so, and without entering into a consideration of the question of boundary arising upon the words of the deed of partition, because they held that the defendant, or his vendor, being openly in possession of the land in dispute, claiming it as his own, and known to be so, the other party to the deed of partition, or his vendee, could not, while so dispossessed, make a legal conveyance of that land to a third party.

There could be no consideration in such a case about the party elect-

ing to be disseized; he had actually been instrumental in placing the other in possession as owner, and had acquiesced in such possession, and he had neither an actual nor constructive seisin in the property which he could transfer to another.

In the case now before us, the circumstances were quite different under which the lessor of the plaintiff took his conveyance. That deed was made in 1844, and it is clear from the conduct of Ketchum, the proprietor of lot 8 in 1846, that he claimed nothing more at that time than what should turn out on a correct survey to form part of his lot, for he concurred with the lessor of the plaintiff in procuring a survey to be made, by which he agreed that their occupation should be adjusted, though he now declines to abide by it. If then, in 1844, he was in possession of part of the piece of the land which is now in dispute, (and the evidence does not shew that he was in actual possession of the whole of it, so that the objection does not go to the extent of affecting the verdict), yet the inference from what he did and assented to in 1846, was, that he held such possession, not in defiance of the true owner-but only on the supposition (which by his conduct, he admitted might be unfounded) that it formed part of lot 8, to which alone he pretended any right.

While he held on that footing, not claiming the land otherwise than if it should turn out to be within his true boundary, I am of opinion that the owner of lot 7 was not disabled by such occupation, from making a deed of 7, which would give to the grantee in such deed the right to hold all that really formed a part of lot 7, as fully as he, the grantor could. If we should hold otherwise, then it would follow that whenever A., by error, and unintentionally, has so placed his fences as to encroach on his neigh. bour's land, the piece so encroached upon, though it might form a slip of but a few yards or inches in breadth, would in case of his neighbour's alienating his lot while things were in that situation, be thenceforward separated from the rest of the lot, so that it would not pass under any subsequent transfer. The vendee of the lot ignorantly and undesignedly encroached upon, would not be able to bring an action for rectifying the error and regaining the land, but the right of action and the title would reside in the former proprietor. It has never been considered that such a consequence has followed in such cases, and it would be unreasonable and inconvenient that it should.

The general principle unquestionably is, that while one man is in actual and exclusive possession of land which he claims as his own, another, though the true title may be vested in him, cannot make a conveyance of property so held adversely to him which will have the effect of passing the fee; but so long as the boundary is unsettled and unascertained, and neither party has given evidence of an intention to hold more than his deed will cover, either on the ground of long possession, or on some other ground, or without ground, defying and holding out the true owner, while this is the case, I consider that either is in a condition to convey his lot of land generally and fully; and that his conveyance will

pass all that upon a survey he could legally have held, if he had not alienated. The law, so far as I have information on this point, has been always assumed to be so.

There was a point made in the argument of this case, on which it is proper that an opinion should be expressed, though on my view of the case, this rule may be disposed of on grounds independent of it—I mean the claim advanced by the defendant to have it considered that the lessor of the plaintiff, and those under whom he makes title, have been actually dispossessed of all this land in dispute, for the whole time that the defendant or Ketchum has kept up the fence, which extends only through a part of it, on the principle that the laying down the fence as far as was done from the front, should be considered as excluding the proprietor of the adjoining lot from whatever land the fence, if protracted to the rear, would cut off from him, though for a great part of the time there was a portion of the rear part of the lot through which the fence was not continued, and from the possession of which the latter was not excluded.

I do not consent to this doctrine of gaining a right, by establishing a wrong through nothing but a constructive and imaginary possession, and have frequently in other cases declared that I do not. When the owners of adjacent lots agree, either in consequence of a survey or otherwise, to a certain line of division, and lay their fences accordingly, but carry them out only part of the way, then it may perhaps be found reasonable to hold each to be constructively in possession of the land which would fall on his side of the division line so mutually assented to if the same were protracted; but the present is not such a case, and the general principle I take to be, that what a man suffers himself to be actually dispossessed of and excluded from for twenty years, he has lost; but that he is not to be barred of his right by the Statute of Limitations, in land of which he is the true owner, by any mere constructive possession, resting on an ideal enlargement of a trespass beyond its actual scope.

In this case, while the proprietor of Lot 8 had merely pushed his fence part of the way through his neighbour's land, interfering in no degree with his possession of the remainder, the neighbouring proprietor of Lot 7 must be looked upon in law as constructively in possession of all that his title covered. He could not have convicted the proprietor of Lot 8, of trespassing on land in the rear of Lot 7, merely because he had placed his fence in front on a line with it; he had as regarded that land suffered no wrong, and therefore cannot be held to have delayed seeking a remedy, nor consequently to have lost any right by such delay.

MACAULAY, I.—I cannot say I am quite satisfied that on the evidence in this case the plaintiff is entitled to recover.

Of part of the tract claimed, the defendant and those under whom he holds, had clearly been in possession upwards of twenty years before a

possession, still there was evidence thereof, and at all events it was clear the defendant was, and for a long time before Rennie conveyed to plaintiff's lessor had been, in actual possession, claiming it to be part of No. 8.

The lessor of plaintiff bought a part of No. 7, including this tract, if part of No. 7, as the jury have found it to be; but the deed from Rennie to plaintiff's lessor could' only operate under the Statute of Uses, and I think the evidence strong to shew, that he was not seised of the tract in dispute at the time of its execution; and the same being in the adverse possession of the defendant, I am much disposed to think there was an ouster or disseisin sufficient to prevent Rennie conveying the same, without previously acquiring or regaining possession; in short, sufficent to prevent his assigning a right of action or of entry therefor to the lessor of the plaintiff.—Doe Wilkins v. Evans, I M. Gr. & Scott; I C. B. 717.

Could he have conveyed so as to pass the estate and right of entry to the plaintiff's lessor, while defendant was in possession, under the circumstances in evidence? I think not.

The rest of the court, however, entertain a different opinion. I only therefore express my doubts on the subject.

DRAPER, J., concurred in opinion with the Chief Justice.

McLean, J., being in the Ptactice Court during the argument, gave no judgment.

SULLIVAN, J., not having been appointed at the time of argument, gave no judgment.

Per Cur.—Rule discharged.

MACAULAY, J., dubitante.

WATSON V. THE CITY OF TORONTO GAS LIGHT AND WATER COMPANY

The plaintiff sued the defendant in case upon certain injuries specifically set forth in the declaration as his cause of action. At the assizes, the cause was referred to arbitration, and a verdict was taken for the plaintiff for roool, subject to be increased or diminished by the award. By the terms of the reference, the arbitrators had power "to take into con-"sideration the various offers made by the defendants, and finally to "dispose of and settle all the matters in difference, awarding if they should "think fit the payment of an entire sum in full satisfaction of all past "and future demands," &c. Upon this submission the arbitrators declared, that having taken into consideration the matters and things which they were by the said order empowered to take into consideration, they awarded that the verdict for the plaintiff be increased to 12871 10s., with costs to 46l. 10s. And they concluded the award thus, "and the said sums "so to be paid as aforesaid, &c., we do award, order and determine to be, "and the same are for all purposes to be taken, and held to be when paid, "in full satisfaction of all past and future demands of the plaintiff against "the said defendants for or in respect of the subject matter, or subject matters of the said cause, and all and every part thereof." The defendant moved to set aside the award, upon the following grounds: 1st, because the arbitrators, after hearing evidence (as stated in affidavits filed) of other injuries than those mentioned in the declaration, did not make their award "of all matters in difference," as submitted by the reference, but confined it to the subject matters arising out of the cause of action in this suit. 2ndly. Because they did not distinguish in their award, the sum allowed in the cause from the sums allowed for the other matters in difference—but, *Held per Cur.*, award, under the submission, good.

difference—but, Held per Cur., award, under the submission, good. Semble, that upon a general reference at Nisi Prius, the arbitrators may, in making up their award as to the amount of verdict, be governed by their finding upon matters in favor of the defendant, which could not have been brought in question on a trial of the action. Also, that where the verdict is intended to be a final settlement between the parties, the arbitrators may take into consideration matters not embraced within the technical statement of the causes of action in the record, when advanced on the part of the plaintiff.

In this case a rule was granted last term, in the Practice Court, calling upon the plaintiff to shew cause why the award made in favour of the plaintiff, should not be set aside, on the ground that the arbitrators had not found upon all matters in difference referred to them, but had expressly confined their award to the subject matters arising out of the cause of action in this suit; that the said award was not final and conclusive between the parties on the subject matters referred; and that the arbitrators should have distinguished in their award the sum allowed in the cause, from the sums allowed for the other matters in difference.

The plaintiff had brought an action on the case for an injury occasioned to his property by the defendants' gas works, alleging as his damage the deteriorating effects of the gas on the waters of the bay, upon which the plaintiff has a distillery, and the consequent loss to him from his being unable to use the water for the supply of his distillery, amounting in fact to a suspension of the business. The plaintiff also complained in his action, of the noxious quality imparted by the gas works to the atmosphere.

At the assizes the cause was referred, by order of nisi prius, and a verdict was taken for the plaintiff, for 1000l., subject to be increased or diminished by the award of Edward Thomson, Henry Rowswell, and Lewis Moffatt, Esquires, or any two of them; to whom all matters in difference was referred, so as the said arbitrators should make and publish their award in writing of and concerning the matters referred, on or before Trinity Term. And the terms of the reference were, "that the said par-"ties shall on their respective parts, in all things stand to, abide by, "and perform the award of the said arbitrators so to be made, with "further power to the said arbitrators to take into consideration the "various offers made by the defendants, and finally to dispose of and set-"tle all the matters in difference, awarding if they should think fit, the "conveyance of the land before proposed in the city of Toronto, and "the completion of any other offers made between the parties, instead "of any sum of money, or with the part payment of money, or the pay-"ment of an entire sum in full satisfaction of all past and future demands; "costs of the cause and of the award, to abide the determination of "the award. The arbitrators not to be obliged to find upon the issues " separately."

On the 31st July, 1848, the then arbitrators made and published their award, by which, after setting out the rule of reference, they declare,

that having taken into consideration the matters and things which they were by the said order empowered to take into consideration, they awarded and determined that the verdict taken for the plaintiff be increased to 1287l. 10s., and that the defendants do pay such sum to the plaintiff, with his costs of the cause, and of the award (which latter they fix at 46l. 10s.), in four equal instalments, at certain days named in the award. And that the plaintiff may enter up judgment upon the verdict so incurred, and tax his costs forthwith, but that no execution shall issue until default made in some one of the payments.

And the award concludes thus, "and the said sums so to be paid as "aforesaid, at the times aforesaid, or sooner if the defendants think pro"per, &c., we do award, order and determine to be, and the same are
"for all purposes to be taken and held to be when paid, in full satis"faction of all past and future demands of the said plaintiff, against
"the said defendants, for or in respect of the subject matter or subject
"matters of the said cause, and all and every part thereof,"

An affidavit was filed on the part of the defendants, setting forth the causes of action in the suit referred, and deposing that upon the arbitration, the plaintiff proved that in addition to his distillery, he had a flour mill on the said premises, and that he gave evidence of the quality of the flour made at his mill, and the quantity made per day, and produced an estimate of the profits thereof, which had been lost to him from the causes complained of; and that he gave evidence also, that not only were the water and air affected by the nuisance, but the land of the plaintiff was so saturated with coal-tar and other noxious matter, that holes dug in the different parts of the plaintiff's land, were soon filled by a black liquid of a deleterious quality, flowing from the gas works.

The principal complaint made against the award was, that after hearing evidence of these injuries to plaintiff's flour mills and to his land, which were grievances not complained of in the action, the arbitrators awarded a large sum to the plaintiff which they declared "shall be in." full satisfaction of all past and future demands of the plaintiff, for or "in respect of the subject matter or subject matters of the said cause," and all and every part thereof," and not in respect of all matters in difference between the parties, as submitted by the said reference; so that the sum they have awarded cannot be taken to have disposed of any claim which did not form a subject matter of the cause.

Blake, Sol. Gen., shewed cause. Cameron, Q. C., supported the rule The authorities cited were, 3 Bing. N. C, 219; 2 M. & W. 391; Lusty v. Van Volkenburg, in this court; 3 D. & L., 568; 12 M. & W. 708, 802; 6 Bing. N. C. 277; 2 B. & C. 170: 6 Bing. 222; 9 B. & C. 780; Watson on Awards, 275; 16 Law Jl. 266; Exch, II M. & W, 477; I Dowl. N. S. 326; 5 Bing. 281: 4 A, & E. 973; I D. & L. 236; 5 B. & Ad. 403. 9 Dowl. 356; 9 Jurist, 203.

ROBINSON, C. J., delivered the judgment of the court.

Taking the objections in the order in which they are stated in the rule

nisi, the first is, "that the arbitrators have not found upon all the mat-"ters in difference referred to them, but have expressly confined their "award to the subject matters arising out of the cause of action in "this suit.

It will be seen that in the award, the arbitrators declare "that they "had taken into consideration the matters and things which they were" by the said order required to take into consideration," and these we see by the rule of reference were "all matters in difference;" (not merely those to which the action related), including the power, (if they should think fit) to order the payment of a sum of money in full satisfaction "of all past and future demands."

Having thus, as they declare, considered every thing referred to them, that is, all matters in difference; and having express authority to award money to be paid in full satisfaction of all past and future demands (by which words, "future demands," I think it is reasonable to understand only future demands connected with and in consequence of the continuance of the alleged nuisance of the gas works), they proceed to direct that the verdict shall be increased to 1287l. 10s., and "that such sum" shall for all purposes be taken, and held to be when paid, in full satisfaction of all past and future demands of the plaintiff against the defend. "ants, for or in respect of the subject matter or subject matters of the said" cause, and all and every part thereof."

I take this to be in its effects a final disposition of all matters in difference. The arbitrators had considered every thing (as they declare), and this was the result. They were not bound to award that any damages should be paid except for such claims as they thought it just to allow, and if after considering all claims, they had expressly determined that 12871. Ios. shall be paid in respect of one head of claim only, and had said nothing of any other, then the result would be, that the arbitrators have determined that nothing is to be paid to the plaintiff on account of any other head of claim on which they had any authority to determine, and the award is not less final as to all matters not named, and for which nothing is awarded, than it is with regard to the particular head of claim on which the arbitrators direct damages to be paid.

It was formally held in some cases, that if it could be shown that no evidence was given to the arbitrators respecting a demand on which they could have awarded, if a claim had been advanced for it, the award would not bar any future recovery in respect to such demand; but it has been more reasonably held since, that neither party can voluntarily withhold any claim from the arbitrators, and reserve it to be the ground of a future action; but that if he was aware of the demand, and yet did not advance it, the award will bar him. I mean, of course, any demand within the terms of the submission.

But the case here is stronger, for the plaintiff himself shews us that the arbitrators did actually receive evidence of other causes of action besides those immediately connected with the plaintiff's distillery; and as to such demands, having heard them, we are to presume that they considered them, and disposed of them; and as to them and all other matters in difference, the award would be not the less conclusive because it made no express allusion to them. The only inference that we should be warranted in drawing from that, would be, not that the arbitrators left any claim open and undetermined, which they might have settled, but that they found no other ground of demand substantiated to their satisfaction than that on account of which they have awarded money to be paid.

This disposes of the first two of the three objections stated in the rule.

The remaining objection is, that the arbitrators should have distinguished in their award "the sum allowed in the cause from the sums "allowed for the other matters in difference," in support of which Mortin v. Burge, 4 Ad. & Ell. 973, is referred to; but the facts of that case, and the ground of objection there, were very different. That award was deficient in not directing a verdict to be entered for any certain sum which according to the reference ought to have been done. not without difficulty, and perhaps by too rigid a construction, held that it would be only surmise to hold that the sum which the arbitrator had awarded in that case to be paid to the plaintiff, was the sum for which he had decided the verdict should be entered, for he had authority to decide the cause, and all matters in difference, and so the court set the award aside. A conditional verdict had been taken for 300l., and the arbitrator had by his award directed plaintiff to pay the defendant 2601. In the case now before us, the arbitrators have expressly awarded one certain sum to be paid to the plaintiff: and have directed the verdict to be entered for that sum. There can be no doubt, in the first place, that that finally disposes of all causes of action for which the plaintiff could have recovered in the action; and does it not also as finally dispose of all other matters in difference?

As to all matters for which damages could be claimed or a demand of any kind made, up to the time of the submission, I am of opinion that it does clearly, because even if in such a case, where an action has been brought and a verdict taken, the sum for which the verdict is by the award directed to be entered, must necessarily be to all purposes assumed and treated to be in compensation of such grounds of action only as could have been recovered for on a trial of the cause, yet I take it to be clear, that the fact that nothing has been awarded to be paid for any other injury or claim, is in itself a decision that nothing was justly due on any other account, and that on that principle the award is as final in respect to matters not mentioned as to those that are.

We must presume, that if the arbitrators could clearly have included nothing in the sum which was to be inserted in place of the verdict but what the action would cover, then if they had found beside that, other moneys due, or on any account payable to the plaintiff, they would have awarded accordingly, that such sums should be paid in addition to the sum which was to be entered as the verdict in the cause; and not having

done so, we are to presume, in support of their award, that they gave the plaintiff all to which they found him entitled in the sum which they have awarded to him.—I M. & S. 676; I Taunton, 158, Prentice v. Reed, 3 Ea. 139.

If, therefore, we are bound to hold that no sum could be included in the verdict which had not a strict relation to the cause of action, then we should not be at liberty to assume that the arbitrators had given damages for injuries of another nature. If, on the other hand, the award on the face of it shews plainly that they have, then we must decide the case with the knowledge that they have done so.

In Prentice v. Reed, I Taunt. 158, the verdict is in such a case treated as merely intended by consent to give the party the security of a judgment for whatever may be awarded under a submission of all matters in difference, when the reference is thus general. Of course the verdict cannot be for a larger sum than the damages laid in the declaration, because then there would be a repugnance in the record. decided under the statute respecting costs, in case of vexatious arrest, when there has been a reference to arbitration, seem all to proceed upon the assumption, that upon a general reference, the arbitrators may, in making up their award, as to the amount of verdict, be governed by their finding upon matters in favour of the defendant, which could not have been brought in question on a trial of the action; and it must follow that, for the purpose of making the verdict a final settlement, as intended, they may equally take into consideration matters not embraced within the technical statement of the causes of action in the record, when advanced on the part of the plaintiff, for otherwise they could not justly settle all matters between the parties.-5 D. & R. 483; I B. & B. 278; 3 M. & W. 606.

If they could not do this, then it must follow that the award now before us, could not be supported, because the sum awarded, viz. 12871. 10s., for which the verdict is to be entered, is declared in the award to be in full satisfaction of all future demands of the plaintiff against the defendant, in respect to the subject matter of the cause. If however, a verdict could thus be directed for a sum, including damages not strictly demandable in the action at law, then I see no principle of which we should hold the award bad, for not distinguishing how much was awarded under one head, and how much under another.

In this case, the parties have consented that the arbitrators should determine all matters in difference—that they might award "an entire sum" to be paid in full satisfaction of all past and future demands, which award was to be carried into effect by means of a verdict to be entered in the cause pending; and the arbitrators having awarded 1287, tos., to be paid in satisfaction of all past and future demands for or in respect of the subject-matters of the cause, it is my opinion that it is a perfectly good award, entitling the plaintiff on the one side to compensation once for all by means of it, for all damages of all kinds

occasioned or to be occasioned to his premises by the nuisance of the gasworks, and protecting the defendants on the other side from being hereafter molested by any future demand on account of the nuisance occasioned by their gas-works to the same premises.

The settling by award a compensation to be allowed for prospective injuries and claims of this kind, arising out of an already existing nuisance, is not by any means unusual, and awards made with that intention have been frequently sustained. The parties evidently meant the arbitrators to have that authority in this case, and nothing has been done that we can say was not contemplated by, and provided for in the submission.

That the award is in amount just and reasonable, is what we are not called upon to determine; nor is it within our province to canvas the award upon the merits. We only hold, that we see nothing done contrary to the intention and legal effect of the submission, and that the award is in our opinion final; that it disposes in its effect of all matters referred, and is not void by reason of the objections taken. The case of Gray v. Gwenap, I B. & Al. 106, is a conclusive authority I think in favour of this award, in regard to the principal points discussed.

Both parties agreed by this submission that the arbitrators should hear and determine all matters in difference between them, not only such as could come in question on the trial of the cause, but all other matters: and that whatever sum they might find to be due to the plaintiff as the result of their whole investigation, should be entered as the verdict in this cause. This is certainly what they meant. The law, I think, offers no impediment to this understanding being carried into effect, for refer ences under such circumstances have, so far as I have observed, been constantly so carried into effect here, and the case I have cited, Gray v. Gwenap, and many others, shew that it is the common course in Eng-The arbitrators, then enter upon their task under this broad It is not complained that they did not hear whatever submission. demands either party advanced, and having heard all, they have awarded a certain sum to the plaintiff, to be entered as the verdict in his favour, in pursuance of the consent of the parties, who could waive any apparent inconsistency or informality in that respect. All then is right so far; and the arbitrators proceed to declare that that sum when received by the plaintiff shall be in full satisfaction of all past and future demands "in respect of the subject-matter of the cause." This seems to have given occasion for impeaching the award, but on no good ground that I can see, for those words merely inform us that the arbitrators have given prospective damages in respect to the nuisance com' plained of, so far as it may hereafter affect a certain property of the plaintiff's. That is what they were expressly authorised to do; and it is reasonable and expedient in such cases that damages should be given once for all. It is frequently done, and I think there is no objection to the plaintiff having the benefit of the verdict and judgment to cover that part of the award, as well as any other, because to that the parties have

consented, though no donbt on a trial at law it could not have been recovered.

It seems to be objected, that because the arbitrators have made an express provision that the sum awarded shall be in satisfaction of all demands. past and future; arising out of the subject-matter of the action, it must therefore follow that it is in satisfaction of those demands only. But that is not a legitimate inference. That clause in the award is inserted ex majori cautela, from the idea that it might be necessary to declare it explicitly in order to bar future demands, but it does not by any means amount to a declaration that the 1287l. may not also cover all other demands which they found the plaintiff could justly urge. It affords no argument that they have not disposed of everything else.

Per Cur.—Rule discharged.

KAY V. CAMERON.

Partnership. Failure of consideration. Recision of contract. Money had and received. Held, per Cur., that under all the circumstances of this case (which are too long and special to repeat in the digest) the plaintiff could not bring an action for money had and received, to recover back the money mentioned in the defendant's receipt marked B.

Robinson, C. J., dissentiente.

In this case the plaintiff had a verdict for 362l. 5s., including 12l. 5s. interest, subject to the opinion of the court upon the law and facts.

The defendant and one Miller were partners in the Goderich Foundry, and the plaintiff agreed to purchase the interest of the defendant, and entered into partnership by agreement.

Memorandum between George Miller, John Kay, and Malcolm Cameron. "It is agreed that George Miller and John Kay, go into the "business of Foundry, in Goderich," under the style of 'The Goderich Terms of co-"Foundry, Miller & Kay,' for the term of five years. "partnership to be drawn up within one month, before which time Mr. "Miller is to make up his statement of the amount of capital he has put "in; Mr. Kay is to pay Mr. Cameron three hundred and fifty pounds, "and for whatever balance Mr. Miller has in more than Mr. Kay, Kay "to pay him interest at six per cent.; both parties to give their whole "time and attention to the said business. Mr. Miller in the manage-"ment of the practical part, and Mr. Kay to the books, buying and sel-"ling, and any other way in which he can best aid the interests of the "said company. Neither of the parties are expected to withdraw more 'than 150l. a year, for private expenses. Mr. Cameron to send the "firm immediately, ten tons of Scotch pig iron, six tons coal, three "hundred fire brick; and for this they are to pay Mr. Cameron for the "amount of Miller's account paid Moderwell, of eight-five pounds, and "the above mentioned stock, within one year from this date, and for the ' balance of the whole amount paid Moderwell for the foundry after the

"settlement, and deducting Kay's money in four years from this date "with interest."

(Signed) "George Miller. (Signed) "John Kay. (Signed) "Malcolm Cameron."

In payment of the purchase money, 350l. for the defendant's interest in the concern, the plaintiff's brother, W. Kay, transferred to the defendant a mortgage for that sum which he held upon land in the Bathurst District, and the plaintiff took a receipt.

(B)

"Received, November 16th, 1847, from William Kay, Esq., the sum of "three hundred and fifty pounds, being an amount paid by him on account of stock taken by Mr. John Kay, of Goderich, in the Goderich Foundry, of which he, Mr. John Kay, has bought half."

(Signed) "Malcolm Cameron."

"December 14th, 1847."

It was admitted, that the defendant released the mortgage, and took a mortgage not from the original mortgagor, Glass, but from the purchaser of the same land from Glass, which mortgage has not been paid. Agreement and receipt admitted. The following evidence was admitted:

George Miller.—In November last, witness and defendant were partners in the Goderich foundry; considered the agreement proved, as an inception of a partnership, not an actual partnership between himself and the plaintiff; defendant was to be back in the course of a month, and the proposed arrangement was to be perfected. Letter from the defendant to the plaintiff, put in and admitted:

" Dear sir,

"Did I not tell you, did I not write Mr. Moderwell, that I had assigned the mortgage, and given the man three years, and therefore could not retrace the steps taken. You voluntarily entered into a partinership with Mr. Miller; you paid me the mortgage and I sold it, and you and Mr. Miller have received all I agreed to send you, fulfilling to the letter, as I have always done with every man, my agreement; and you must prepare to pay me the balance as agreed, if you do not mutually dissolve. If you cannot agree and satisfy Mr. Miller, I will be willing to pay you your money, as fast as I can get it, and let Miller go on, which is more than any other man would do with you. You are a partner with Mr. Miller, and it is purely a matter between you and he. "Your partnership dissolved ours finally.

(Signed) "Malcolm Cameron."

"To Mr. John Kay, Goderich."

The plaintiff went to Sarnia, to induce the defendant to come to Goderich and arrange the matter—he did not—plaintiff was to take the rest of defendant, and paid 350l., on account of it. When the state nt according to the agreement was made out, the plaintiff was to pay balance of the defendant's interest, over 350l., as agreed upon be

tween them. The plaintiff entered into the business in the shop, and all went on very well for a week, when the plaintiff asked witness if he was to work as a mechanic, that he understood he was only to keep the books and sell and buy. Witness considered, that the plaintiff was not so employed, he was to work with his hands. Upon which the plaintiff left, and nothing more was done; the statement contemplated was never made by the witness, and after this difference of opinion nothing further was done. The plaintiff told the witness, that he would not give the mortgage until the matter was finally settled. The defendant's advances in the concern are over 700l. No writings between witness and defendant considers that the defendant, and not plaintiff, is his partner. The iron and coal came after the expiration of the month mentioned in the agreement, and was delivered to Miller, the witness.

Witness for the defendant, Robert Moderwell.—After the memorandum agreement, defendant was ill, and the defendant said he was to be back in a month, and take the joint obligation of Miller and plaintiff for the value of his interest over the 350l. The plaintiff said he could not agree with Miller after seven or eight days, because he desired him to work as a journeyman. The defendant was only to come up to take the security for the balance.

J. Strachan, of Goderch, for the plaintiff.

Morrison for the defendant.

The authorities cited were, 4 Bing. 179; 13 E. R. 20; 2 T. R. 366; 3 B. & C. 421; 5 B. & Al. 606, 611; 7 Ea. 274; 11 Ea. 52; 1 Y. & J. 380.

ROBINSON, C. J.—The plaintiff's brother having, upon an undertaking between the plaintiff and him which is immaterial to the present case, transferred to defendant a mortgage which he held against Glass for 350l., intended to be, and accepted as a payment of the 350l., to be paid by plaintiff to defendant, it is the same as a payment in money made by the plaintiff himself, particularly as the defendant has treated the mortgage as his own, released it and taken another from a stranger to himself. The effect is the same as if he had actually received the money from Glass, and then lent it out to the other party, from whom he took the new mortgage, which indeed, for all we can see, he may have done.

In Spratt et al. v. Hobson, 4 Bing. 179, the court say, "the principle "in all the cases is, that if a thing be received as money, it may be treated "and received as such" (13 Ea. R. 20); and here the defendant gave his receipt in terms as for so much money paid to him.

Then, looking upon the defendant as having the 350l. in his hand, has the plaintiff a legal right under the circumstances to call upon him to refund it? It does not appear in the case by what time the 350l. was to be paid according to the argument, nor when it actually was paid; but it was clearly received by defendant as part of the consideration for an arrangement which had fallen through, and not, as we can say upon satisfactory ground, by the mere fault of the plaintiff. The

defendant has by his letters offered to return the money, as indeed he seems bound to do; and the only consideration to be disposed of is whether he can properly claim to make the plaintiff wait till he recovers the money lent out upon the new mortgage; and when that may be is nowhere stated. "I have sold the mortgage," the defendant says in one of his letters. In another, he says, "I'll stay in, and pay Kay as soon as I am paid." The defendant was to have gone to Goderich in a month from 4th October, 1847, to perfect the arrangement; and this he did not do, being prevented, as it seems, by illness. It is difficult to tell how much this may have contributed to unsettle the arrangement; but we see that the defendant, on his view of all the circumstances, seems to have been content to resume his position in the partnership, and treat the intermediate treaty with plaintiff as at an end and return the plaintiff his 350l.; and that being so, I think he cannot, on anything that has occurred found a right to detain the 350l. till he gets back the money, which we must look at as lent out by him on a new mortgage, for a period of which we are not informed, and by an arrangement in which plaintiff had no voice.

If he had made any other use of the 350l., by which he had sunk it, he might as well refuse to return it altogether. I believe my brothers have not formed the same opinion upon this latter point, and I am not sure that they fully agree in the view which I have taken of the other. If it were not for this circumstance, I must say that, in regard to the first question, that is, whether we are to look on the defendant as having received the 350l., I should not feel the slightest hesitation.

The effect of the defendant's receipt is, that he acknowledges to have received from William Kay 350l, on account of the plaintiff, John Kay, being for the stock and interest in the Goderich foundry, which the plaintiff had bought of the defendant. That is the same as if he had admitted its receipt from the hands of the defendant himself.

Then it is true that it was shown by evidence, apart from this receipt that what the plaintiff received in fact was not 350l. in money, but a mortgage on the land of Glass, which he took as equivalent to so much money. A receipt, no doubt, when it is obtained by fraud, or given under a mistake, is always capable of explanation, and is not conclusive; but this is not a case of that kind. No imposition or mistake is suggested. The defendant deliberately agreed to take the mortgage as money, and gave his receipt upon that understanding, and he cannot now deny that he was paid. The case of Spratt v. Hobhouse, 4 Bing. 179: Pickard v. Banks, 13 E. R. 20—and other authorities, are clear upon that point. And the principle is everywhere laid down as it is stated by Mr. Starkie, in his Treatise on Evidence, 2nd vol. 81, where he says " It may be laid down as a general rule, that if a thing be received as "money, it may be treated and recovered as such." This principle is acted upon in every day's transactions. A creditor holds his debtor's bond or note, and indorses upon it from time to time such payments as he receives, or gives him receipts. These payments are not always made

in money, though they are expressed to be so. The creditor may have taken land, or goods, or labor, in payment; but whatever he takes as money auswers as a money payment, and may be treated as such to all purposes as regards its legal effect. And here, when the defendant has actually parted with the mortgage which he took for the 350l., and so put it out of his power to return it, I cannot say I have any doubt that he is to be held as having received the 350l. in the terms of his receipt.

The other point admits of doubt; and I am not satisfied that my brothers' view of it is not the correct one, though as the impression of my mind is different, I cannot avoid declaring it to be so.

It is clear, no doubt, that this action for money had and received will never lie to compel a person to pay money, contrary to equity and good conscience. And if from the evidence we could certainly draw the conclusion that it was agreed between the plaintiff and defendant that, in case the defendant should return to his position as partner with Miller, he was not to return the 350l. till a certain day, or till he got in the new mortgage which he had chosen to take instead of that which he received, then Kay ought not to be allowed to enforce it contrary to his agreement. But I see nothing conclusive in the evidence beyond this, that the defendant, having sold out his place and interest in the late firm to Kay, and received 350l. in account—leaving some things yet unascertained and unsettled, which were necessary for completing the arrangement, a misunderstanding immediately afterwards occurred between his late partner and Kay, and the proposed new arrangement never took effect. The defendant might have contended that he was in no degree concerned in their misunderstanding, nor in any way responsible for the arrangement falling through, and might have insisted, perhaps justly, on his right to keep clear of the firm and the business, and might have refused to return to the business, but he did not take that course on the contrary, the letters shew an apparent readiness to resume his position, as a consequence of Kay and Miller not going on, and he re-entered the business, using of course the stock and buildings of the late firm as before.

The fair legal inference from all this is, that being restored himself to his former position, and Kay quitting, with his assent, all concern in the property and business, the defendant should refund the consideration which he had received. That is, as I regard the effect of the transaction, should return the 350l. He does indeed say, in a letter to Miller, on the 26th November, "He must carry out an arrangement I made to sell the "mortgage, and I will pay him, and he may quit as soon as he likes." The sale of the mortgage was effected by the defendant himself. On the 14th December, he writes to Kay that he will pay him the money as fast as he can get it; and on 27th December, he writes to Miller again, "If you part in peace, or any how, I'll stay in and pay Kay as I am paid." These are only the declarations of one party, and, if quite precise and un equivocal, are not binding on the legal rights of the other, unless they are shown to have been assented to.

I see no clear ground for denying the plaintiff's right to recover the 350l., to which I think the verdict should be limited.

MACAULAY, J .- It appears to me, the defendant and Miller being partners in the Goderich foundry, the plaintiff agreed to purchase the defendant's interest therein, and to become a partner with Miller, in defendant's place, in pursuance of which the agreement of the 41h October, 1847, was entered into. And although this agreement is not clearly expressed, I understand it to be an agreement for a new partnership; containing the heads thereof, to be embodied in more formal articles within a month. That the plaintiff was to pay the defendant 350l.; and that for the balance of defendant's stock, as compared with Miller's (who was to make up a statement of the capital he had put in within the month), the plaintiff and Miller were to pay defendant interest at 6 per cent., the defendant agreeing to send the new firm iron, coal and bricks, as specified forthwith, for which they were to pay him within a year; as also the amount paid by him to Moderwell on account of Miller, 351.; and the above mentioned balance of defendant's stock exceeding the 350l., and the balance paid Moderwell for the foundry, in four years, after settlement and deducting the plaintiff's money.

The iron, coal and brick, were delivered by the defendant, but not immediately; but I do not see that such delay constituted a condition precedent on his part, or had any thing to do with the new articles of co-partnership, or that the defendant had any thing to do on his part but to execute a more formal instrument, assigning his interest to plaintiff when prepared. Nor is any default on his part, materially affecting the case, shewn in evidence. On the contrary, he seems to have been quite willing to give effect to the agreement of the 4th October, so far as he was concerned; and only consented to put an end to it and resume his connection with Miller, in consequence of disagreements between the latter and the plaintiff, over which he had no control, and to meet their wishes in consequence thereof.

The evidence shews that the plaintiff took possession and continued in the business, as a partner with Miller, for a week, and until a misunderstanding arose between him and Miller, respecting that portion of the business which the plaintiff was to conduct, in consequence of which he abandoned the agreement and seems to have called upon the defendant to pay him the price of the mortgage on request.

The conduct of the defendant appears to me quite reasonable. He had received the assignment of the mortgage from plaintiff's brother, in good faith and in lieu or in satisfaction of the 350l. to be paid by him to the defendant; and having so received it, and while he supposed the new arrangement was in course of accomplishment, if not fully concluded, he consented, to oblige the mortgagor (Glass) to release the mortgage to the vendee of Glass, to take back a new mortgage from such vendee, payable in three years. When it turned out that the plaintiff and Miller could not get on harmoniously, he readily acceded to the wishes of

both parties to rescind the agreement, and to continue as before the partner of Miller, instead of standing (as perhaps he ought to have done) upon his own strict rights under it, and retusing to recede from it or to refund the price received for his stock; but in acquiescing in its rescision, he uniformly (as shewn by all his letters) expressed his willingness to pay the plaintiff as soon as he received the money.

Now I do not see that the defendant was in default, or that it was in the plaintiff's election to rescind the agreement, without the defendant's assent. It appears to me that such his assent was to be taken altogether, including the condition expressed by him, that he should only be bound to re-pay the plaintiff as he himself received the money, for as yet he had in fact received nothing but a security therefor.

In no point of view do I consider the present action for money had and received, to recover the 350*l*., maintainable.

In the first place, the cases are abundant to show that the defendant's receipt, though prima facie evidence, is not conclusive on the defendant; and though, on the face of it, importing the receipt of money by the defendant from the plaintiff, still it may be explained; and when the facts, as they really existed, are shewn, it appears that the plaintiff never paid the defendant any money, but that a third person assigned a mortgage to the defendant, which he accepted in payment or satisfaction of the sum mentioned in the receipt. It may be assumed that such assignment was made at the request and for the benefit of the plaintiff, but there is no proof that the plaintiff had paid the assignor therefor in money, or otherwise satisfied him the amount, if liable so to do.

The mortgage thus assigned was not *money*, or equivalent to money; it is only a security for money. Nor has the defendant converted it into money; on the contrary, he has only shifted the security on the same property from the *mortgagor* to the subsequent vendee of such mortgagor, and seemingly extended the time of payment to a period not yet arrived.

Resting the plaintiff's right of action on the tooting of a total failure of consideration, I do not see any default on the defendant's part. or that the consideration did fail, otherwise than that the plaintiff, having at first accepted, afterwards declined retaining the benefit thereof.

On the ground of the contract being rescinded, the plaintiff had not (under the circumstance) any right to put an end to it, without the defendant's and Miller's consent. He could only do so in the event of a breach or default, and a total failure on their parts, so that all parties could be placed in statu quo; and I do not see that there was such a total non-execution on the defendant's part, for he had parted with his interest to the plaintiff, and received the price, or a large portion thereof, after a month had expired. The plaintiff had entered upon the enjoyment, and became entitled to the benefit for a time. In the meantime, the defendant had changed the security, and was not in a situation to restore to the plaintiff's brother (the assignor) the former mortgage. He cannot therefore place the plaintiff in statu quo, which would be done

by re assigning the original mortgage to the plaintiff's brother; and it is not asserted or shewn that he has been requested to assign the one he now holds.

It is clear to me, that to place the parties in statu quo, the plaintiff should relinquish his right under the agreement to become a partner of Miller, leaving the defendant his partner ab initio, and entitled to all the the benefits thereof; and that the defendant should re-assign to the plaintiff's brother the mortgage he had received from him. But as to the former, how does that consist with the plaintiff and Miller being indebted to defendant for iron, coals and bricks, sold and delivered to them, unless that is rescinded also, and the price thereof treated as so much supplied by the defendant to the firm of Miller and himself, which is making it a new and different transaction? As to the latter, how is the plaintiff entitled to recover from the defendant 350l. in money, in order to place him statu quo?

Lastly, rested as it must be on mutual consent, the agreement can only be rescinded on the terms mutually agreed upon; and so far from the defendant's undertaking to pay the plaintiffs 350l., as already received to his use, he has uniformly disclaimed any such thing, and only promised to pay him as he received the money.

It appears to me, therefore, that this action is not maintainable on the present state of facts.

DRAPER, J.—I take the same view as my brother Macaulay respecting the receipt, not thinking it estops the defendant from showing that in fact no money was received.

But it is argued that the change made by defendant in the security created by the mortgage, in postponing the time of payment, gives the plaintiff a right to recover back the money secured from the defendant the consideration for the transfer of the original mortgage having failed, and the defendant having so dealt with it as to make it his own, and render him immediately accountable for the amount it secured.

It appears to me, however, the defendant had done all that he stipulated, which was material to fulfil the contract. He had gone out of the co-partnership with Miller, and the plaintiff had gone into his place and had become Miller's partner in his stead, and had paid the defend ant the consideration agreed upon. The dispute which arose was between the plaintiff and Miller; the defendant was in no way a party to it. Suppose the dispute to have terminated in a dissolution between Miller and the plaintiff, the defendant refusing to interfere, what more could the plaintiff have insisted on than a share of the partnership effects, and on what plea could that have been denied to him? He could not have pretended, in such an event, to have thrown back their share on the defendant, and have reclaimed his mortgage, or the money secured by it. That it is only by the proposal of the defendant, that the plaintiff has any claim on him. It was in the latter's option to have rejected this proposal, and to have arranged with Miller. If he thinks

it more to his advantage to accept the defendant's proposal, he may do so; but then he cannot, sua sponte, vary its terms; or, in other words, treat this new argument with defendant as a mere rescision of the former one, and so claim to be paid differently from the manner which the new agreement provides for.

McLean, J., in Practice Court during the argument, gave no judgment.

SULLIVAN, J., not being appointed at the time of argument, gave no judgment.

Per Cur.—Judgment of nonsuit to be entered.

ROBINSON, C. J., dissentiente.

BRENT, ASSIGNEE, V. PERRY.

A confession of judgment stated in the pleading to have been given in "contemplation of bankruptcy, and for the purpose of giving one of several creditors a preference, and with the intent to delay and defeat the other creditors," is well pleaded—without further adding that it was given within a month of the issuing of the commission against the bankrupt.

Trover—Assignees of a bankrupt against defendant.

Plea—That before A. B. became a bankrupt, &c., the defendant recovered judgment against the bankrupt, and issued execution thereupon, and levied upon the said goods and chattels in the declaration mentioned which was the supposed conversion, &c.

Replication—That the judgment in the said plea mentioned was recovered by the defendant upon a cognovit actionem, given by the said Chester Draper in contemplation of bankruptcy, and for the purpose of giving the defendant, then being a creditor, among others, of the said Chester Draper, a preference, and with the intent to defeat and delay the other creditors of the said Chester Draper, to wit, on the day and year last aforesaid; and this the plaintiff is ready to verify, &c.

Demurrer to replication—Because the replication did not shew that the cognovit was given within a month prior to the issuing of the commission against the bankrupt.

Cameron, Q. C., and Crooks, for the demurrer.

Hagarty and Hector contra.

The authorities cited were:—5 E. R. 175; 1 T. R. 155; 8 Law Times 320; 12 M. & W. 102, 110; 4 A. &. E. N. S. 673; 2 Campb. 166; 11 E. 756; 4 Burr. 2235; 1 W. Bla. 660; 2 Saund. 49, note 302; 10 M. & W. 36; 7 M. & W. 353; 1 U. C. R. 551.

ROBINSON, C. J., delivered the judgment of the court.

The defendant has demurred to the replication, because he assumes that although a judgment may have been confessed by a trader, in contemplation of bankruptcy and for the purpose of giving one of several creditors a preference, and with the intent to delay and defeat the other creditors, still that such confession of judgment cannot be treated as

fraudulent within the bankrupt laws, unless it is shewn in addition that it was given within a month of the issuing of the commission against the bankrupt. .

The 35th clause of 9 Vic. ch. 30, enacts "that if, at any time within "one month after any trader shall have given a confession of judgment, a "commission of bankruptcy shall issue against him, then such confession "shall be deemed to have been obtained by fraud, and shall be void as "against the assignee," &c.

The evident intention of that clause is, to make it unnecessary, with regard to confessions taken within the month, to inquire with what intent they were given, but to make them void merely on account of their being taken so recently before the bankruptcy. It does not in any degree narrow the effect of the 19th clause of the 7 Vic. ch. 10, by making confessions valid though given in contemplation of bankruptcy, and for the purpose of defeating, &c., provided they have been given more than a month before the commission issues. It was unnecessary for the legislature to declare them to be invalid in the latter act, for they had been made invalid before.

In the case of Beekman v. Workman, decided by us in Easter Term, 8 Vic. (I U. C. Rep. 551), which was cited in the argument, the plaintiff relied upon the giving the cognovit, under the circumstances in which it was given, as being in itself an act of bankruptcy, under the 2nd clause, and one of which the party taking the cognovit necessarily had notice. He insisted that it was in the words of the 2nd clause, "or willingly procuring his goods to be taken in execution."

We consider that in that case there was no evidence whatever that the confession was given in contemplation of bankruptcy, or in order to give a preference for any purpose of the debtor's own; and that in order to make out that the very act of giving the confession was an act of bankruptcy in itself, under the 2nd clause it was necessary to shew that it was a voluntary procuring the debtor's goods to be taken in execution. For such purpose it appeared to me, and I so expressed myself in that case, that the use of the word "voluntarily" or "willingly," in the plea, was indispensable.

The present case comes before us, not as Beekman and Workman did after a trial, and to be considered in connection with the evidence, but we are to pronounce judgment on the pleadings alone; and it can admit of no doubt, that where a plaintiff avers, as is done in this replication, that a confession of judgment was given to one of a number of creditors, in contemplation of bankruptcy, and for the purpose of giving him a preference, and with intent to delay and defeat the other creditors," he pleads that which, according to the 19th clause of the 7 Vic. ch. 10, is utterly void and a fraud on the bankrupt laws.

There can be no doubt that the confession of judgment comes under the term "securities" used in that clause; and even without reference to the special provisions of the bankrupt law, the 13 Eliz. ch. 5, would make the judgment in this case fraudulent and void, for the replication pleads that it was taken with intent to delay and defeat creditors, as well as taken in contemplation of bankruptcy and for the purpose of giving a preference to one creditor.

Mr. Roberts, in his treatise on Fraudulent Conveyances, observes that "although a judgment be confessed upon a just debt, it may yet be fraudulent; for though the debt be bona fide due, the judgment quoad iother creditors may be mala fide confessed, that is, may be confessed with ntent to delay, hinder, or defraud others of their just and lawful actions, and such intent is to be collected from the circumstances of each case."—p. 690.

Now if, on the trial of the truth of this replication, it was shown by the defendant that he did not act under the influence of any such motive as to delay and defeat the other creditors, but acted under compulsion, having the actual pressure of a creditor, and solely with the view to satisfy his urgent application, in other words, that it was not a voluntary preference given by himself; that, it might be contended, would shew the case not to be under the statute. But enough is pleaded to shew this judgment void in the first instance, either under our statute 7 Vic. c. 10, sec. 19, or under 13 Eliz, ch. 5, where the very words of both are used. Whether the facts to be proved on the trial would support the replication, is another question.

In the mean time, I consider the replication to be clearly good; for whether the transaction, when fully explained, is one which the law will uphold as not being with intent to defeat creditors, and not being made in contemplation of bankruptcy, and for the purpose of giving a preference, must be always a question upon the evidence; in reference to which the doctrine maintainable in Holbird v. Anderson, 5 T. R. 235, and many ubs equent cases, will require to be considered.

Per Cur.—Judgment for the plaintiff on demurrer.

GATES V. TINNING.

The proprietor of a race-course is responsible for the purse run for, if an express promise to that effect can be proved.

The pleadings in this case are stated in 3 U. C. Reports, 295.

In addition to the evidence there reported, the plaintiff at the trial of h me in October, 1847, proved that after the plaintiff's mare was entered for the club purse of 751, and before any horse was started, the tdefendant came up into the stand, and was asked and again promised to pay the purses.

Rob. P. Crooks, Esq., swore, that after some hesitation he consented to be a steward, on the express understanding with defendant that he would be responsible to pay the purses; and at the course, on the morning of the race, before any horse started, detendant said, in reply to a question by the stewards, that he was the paymaster, and was ready to pay in gold whenever the race was won.

On the defence it was proved, that the race was "a walk over," and that defendant with a witness went to the stewards and told them t purse would not be paid unless there was a race.

The plaintiff relied exclusively on the defendant's direct promise, as proved, to receive all and pay all; and the case was left to the jury to sa whether they found he had made such a promise. They found for t plaintiff.

At the close of the plaintiff's case, the defendant's council objected that the facts did not establish the defendant's liability, and it was over-ruled subject to the opinion of the court whether the evidence sustained declaration.

ROBINSON, C. J., delivered the judgment of the court.

The particulars of the action, so far as it was necessary to state them for the purpose of deciding upon the propriety of the first verdict, appear in the report of Trinity Term, 10 Vic., 3 U. C. Rep. 295.

At the assizes, in May last, the plaintiff again obtained a verdict, the verdict on the first trial having been given by consent of the parties, subject to the opinion of this court on the sufficiency of the evidence.

We did not consider the evidence given on the first trial sufficient to warrant a verdict for the plaintiff. Upon the last trial, additional evidence was given, which materially strengthened the plaintiff's case; and as the verdict seems to be quite in accordance with justice (so far as there can properly be said to be any justice concerned in litigations of this kind), we are not inclined to obstruct the final determination of the case by this verdict, unless the legal ground was clear against the plaintiff. It has been conceded by the plaintiff's counsel that some of the courts were not supported by the evidence, and he claims to support the verdict only on the 1st and 2nd counts, and on the count for money had and received.

Upon the first trial we did not consider that the evidence given of promises made by the defendant at the preliminary meeting, when the conditions of the race were discussed, was positive and conclusive, and we thought that the printed hand-bill afterwards published was the only thing to be looked to as settling the rights of parties. But on the last trial, besides proving more clearly and satisfactorily than was done before, that the defendant, before the day of the race, engaged that he would pay the winner the sweepstakes, the plaintiff gave positive evidence, that after the printed hand-bill was published, and on the stand, just before the horses started on the race in question, the defendant promised that he would pay the 75l: to the winner. This, in our opinion, warranted the jury in inferring that the defendant had the money in his hands to the use of the person who should win.

It might be taken as an acknowledgment that he had received it, no matter from what quarter, and he was bound therefore to pay it over to the person entitled.

CONSUMERS' GAS COMPANY V. KISSOCK.

Leaving a notice of trial at an office of an attorney, is not a service, unless

it is sworn to have been given to some person there.

Where a notice of trial is not shewn to have been served, no notice of intention to move against the verdict can be required, and the verdict may be set aside, without an affidavit of merits.

The plaintiffs declared in assumpsit, and stated that the defendant, on the 21st of July, 1848, was indebted to plaintiffs in 50l., for monies payble by defendant to plaintiff, for and in respect of ten shares which the defendant held in the stock of the said company, by virtue of divers calls before them duly made by the plaintiffs for the said monies, and that defendant in consideration thereof promised to pay the same to plaintiffs. but has not paid, &c. Damages, 100l.

Plea, non-assumpsit. Verdict for plaintiffs, 57l. 16s. 3d.

Defendant by Eccles moved to set aside the verdict for irregularity, with costs, or that judgment be arrested.

The defendant made affidavit that he never received notice of trial.

His attorney, Mr. Eccles, swore that he duly appeared for defendant, as his attorney; that no notice of trial was served on him, nor at his office, as he believed, nor had any come to his knowledge; and his clerk, Mr. Barton, made an affidavit to the same purport.

A clerk of plaintiff's attorney swore, that on the 21st September, "he left a true copy of notice of trial annexed to his affidavit, at the office "of the plaintiffs' attorney," (not stating that he delivered it to any one).

The plaintiffs' attorney swore that the verdict was taken on the 24th of October, 1848; that some days before, during the assizes, he informed the clerk of defendant's attorney, Mr. Barton, that he intended to go to trial, and that notice of trial had been served, when Barton said he knew nothing about it; that he conversed also with Mr. Cole, partner of defendant's attorney, and received no intimation from any one of an intention to move against the verdict.

The authorities cited in this case, were 3 B. & Ad. 328; 5 B. & Ad. 507; 1 Dowl. N. C. 190; 7 Bing. 224; 2 Ch. Rep. 169; Buller's N. P. 129; 5 T. R. 130; 2 Dougl. 727; 2 Wils. 95; 2 Levz. 252; 3 Keb. 677; 4 M. & S. 287; Billings v. Read, Truscott v. Goldie, Barrett v. Bate, in this court.

Robinson, C. J., delivered the judgment of the court.

Though the verdict may be perfectly just and legal, if rendered under other circumstances, yet we think upon the facts stated and not denied, we have no discretion to sustain it, but are bound to set it aside.

Leaving a notice of trial at an office, is not a service, unless it is sworn to have been given to some person there. It may have been thrown on the floor, or on a table among a number of papers, where it might escape notice. There is no sufficient ground for inferring that it came to the knowledge of the party intended be served; and

it is positively sworn that it did not. Then the irregularity is not waived by anything that took place afterwards; and where a notice of trial is not shewn to have been served, no notice of intention to move against the verdict can, in the nature of things, be required.

The plaintiff's attorney here seems also to have been reasonably warned of the want of notice before the trial. An affidavit of merits is not necessary in this case, None of the cases cited were similar to the present.

Per Cur.-Rule absolute.

COMMERCIAL BANK V. WELLER.

Delivering a notice of non-payment to an indorser by leaving it with an out-door servan, cutting fire wood—not known—and proved to have been an inmate in the indorser's family—is insufficient. It will be a question of fact, however, for the jury to determine, whether the subsequent conduct of the indorser shews him to have received the notice in due time. And where the jury find for the plaintiff, though the judge's charge may be against the finding, the court will not set aside the verdict, if the indorser files no affidavit denying that he had notice.

Assumpsi on a promissory note given by Calcut, payable to Evans or order, and indorsed by Evans and by the defendant.

Pleas: 1st, that the defendant had not due notice of non-payment.

and, an alleged agreement for time, between the plaintiff and Calcut the maker, without the defendant's assent; which last defence was not attempted to be supported.

To prove notice of non-payment on the first plea, the plaintiff's produced a clerk, who swore that on the day the note fell due, he delivered the regular notice of non-payment to a man whom he saw cutting firewood in the defendant's yard, and whom he supposed to be the defendant's servant, only from seeing him so employed. He told this man to give the notice to the defendant.

In addition to this, the plaintift's attorney swore that before he brought this action, he was asked by the defendant, whom he met casually, whether the note was not settled; he the defendant alleging that the witness had told him it was settled; that the witness told the defendant the note was not paid or settled, and denied that he had ever told him otherwise. Upon which the defendant insisted that in a former conversation, when he had put the same question to the witness, he (the witness) had declined giving him any satisfaction, stating that as he had understood the defendant had not been notified of non-payment, he should give him no explanation about it, and that the defendant, in this latter conversation with the witness, insisted that he had, in consequence of what the witness said, gone to the bank, and ascertained that he had been duly notified, and that upon stating that to the witness, he had been then informed by him, that the note had been settled.

There was no doubt that the note was not in fact settled, and this evi-

dence was only offered with the view of shewing that the defendant had admitted himself to have been duly notified.

Verdict for the plaintiff, 260l. IIs. 6d.

D. B. Read moved to set aside the verdict, on the ground that the verdict was against law and evidence and the judge's charge.

Cameron, Q. C., shewed cause.

The authorities cited were, 5 Scott N. R. 460; I Q. B. R. 39; 2 Campb. 106, n.: 4 Taunt. 95; I M. & G. 83; 2 C. & Kir. 547; Byles, 212; 2 M. & W. 348; I Esp. C. 4.

ROBINSON, C. J., delivered the judgment of the court.

I told the jury, that if there had been no evidence whatever of notice except the delivery to an out-door servant, not known, and proved to have been an inmate in the defendant's family, and who may have been a person casually employed to do a particular job of work on the premises, I should consider the notice insufficient, but that if the evidence laid a foundation for the belief that the witness actually received the notice, or if his conduct or declarations afterwards convinced the jury that he had, upon inquiry at the bank, received notice verbal or otherwise in due time, of the fact of non-payment, then he would be liable.

I explained further to the jury, that nothing that may have passed at the bank would be sufficient to make the defendant liable, unless it afforded ground for inferring that he had received the notice in due time, because if after the time had passed, he had called to inquire and had then received information for the first time of the fact with regard to the service of notice, we could not reasonably suppose that the bank clerk could then have told him any thing different from what he has sworn upon the trial, and that would leave the question remaining whether the notice being so served was sufficient to charge an indorser; and my opinion was, that it was not sufficient. My charge was not in favour of the plaintiffs, but rather the contrary, though I called the attention of the jury to the consideration of what passed between the defendant and the plaintiff's attorney, as furnishing some evidence of an admission of liability, for he insisted that having ascertained his liability, and acquainted the plaintiff's attorney with the fact, he had claimed a right to be informed whether the demand was settled or not.

The jury found a verdict for the plaintiff, and a new trial has been moved on the ground that the verdict was against law and evidence, and the judge's charge.

The defendant files no affidavit denying that he had notice.

My brothers, I believe, think that we cannot properly set aside this verdict, and I am of that opinion. The case of Brownell v. Bonney, I Q. R. 39, confirms me in the impression that there was certainly such evidence to go to the jury, as it was necessary they should pronounce upon, and that I could not properly have directed a nonsuit. Then the jury having found for the plaintiff on a charge not excepted to, and which inclined rather in favour of the defendant, than otherwise, and

the defendant not having filed any affidavit in support of his rule denying that he received the notice which was left in due time with a person upon his premises, we cannot properly set aside the verdict.

The defendant claiming (according to Mr. Smith's evidence) a right to be informed whether the suit was settled, on the express ground that he had an interest in the inquiry, for that he had ascertained that he had been notified in due time, is a strong circumstance, and might well be taken by the jury as such an admission of liability as dispensed with the ordinary proof of notice.

It may well have happened, that the defendant having received promptly the notice in question, from the man upon his premises to whom it was given, and afterwards mislaid it, may have been uncertain to what particular note it related, and may have inquired at the bank, as he stated, with the view of ascertaining that point; and what he learned there may have convinced him that he had been duly notified; in other words, that the note left with the man in his yard, was a notice referring to this note; and at any rate such a conversation as Mr. Smith stated, would amount to a declaration that he did not intend to object to the informality.

Per Cur.--Rule discharged.

CROSBY V. COLLINS.

To a plea of the Statute of Limitations, the plaintiff replied, that when the cause of action accrued, he was in foreign parts, &c., and did not return to this Province till 1st July, 1846. The defendant rejoined, that the plaintiff did not on the day named, or at any time, return to Upper Canada. Upon this issue the defendant proved that the plaintiff was not at any time in the Province, and asked to non-suit the plaintiff; but, Held per Cur., that the issue was immaterial, and the defendant not entitled to a nonsuit.

Declaration on two promissory notes, made by the defendant, payable to the plaintiff.

The defendant pleaded as his 2nd plea, the Statute of Limitations.

The plaintiff replied, that when the cause of action accrued, he was in foreign parts, &c., and did not return to this Province till 1st July 1846.

The defendant rejoined, that the plaintiff did not on the day named or at any time, return to Upper Canada.

The defendant at the trial moved for a nonsuit but a verdict was directed for the plaintiff.

Verdict for the plaintiff 3441. 16s. 4d.

ROBINSON, C. J., delivered the judgment of the court.

It has been left to the court, without argument, to say whether the plaintiff should not have non-suited. Clearly he should not—the only question is, whether the defendant should have had a verdict entered for him on a very absurd issue, which the plaintiff consented to raise on his rejoinder.

The fact, it seems, was as defendant pleaded, that plaintiff was not in this Province at any time, but whether he was or not was of no moment, for he could remain always abroad and still bring his action when he chose, and not till he chose; such being the effect of the statute, though not very reasonable that it should be so.

The case has never been argued, but it has been left for us to determine on a view of the record and the evidence, whether the plaintiff should not have been non-suited. If the defendant had insisted on the trial, that he ought to have a verdict entered for him, on the issue on the second plea, it might have been thought necessary so to decide, but that would only have shown him entitled to the costs of that issue. The finding upon it would not have determined the cause in the plaintiff's favour.

Per Cur.—Nonsuit refused.

BUELL V. READ.

A., at a time when no one else had a mill lower down the stream, made a dam across the river where it issued from a pond or lake, and kept back the water for the purposes of a mill, which he had erected below the dam. After A.'s dam and mill had been thus erected, B. built a mill lower down the stream, which for 20 years and more had been adequately supplied with water by the escape water from A.'s dam. As A, had, in addition to his mill below his dam, a saw mill below B.'s mill, B. had rarely to complain of the water being injuriously retained by A.'s dam, and made therefore no objection to A.'s obstruction of the water by his dam, for twenty years. After forty years and more had elapsed, A.'s saw mill passed into other hands, and A.'s mill, from decay, stopped working. A. therefore having no object of his own in allowing the water any longer to escape from his dam, kept it penned back, and thus prevented B. from working his mill below. Upon this B. at once brought an action on the case against A., for obstructing the flow of water to his mill by the erection of his dam. A. pleaded an easement, and contended that as he had had the unrestricted control of the dam for twenty years, he might exercise the right whenever he pleased of preventing any water escaping to B.'s mill, but *Held*, *per Cur.*, that the only easement acquired by A., under these facts, was the *qualified* one of penning back the water for the purpose of his own mill, so as not to interfere with B.'s use of the waste water, as he had been enjoying it for the working of his (B,'s) mill, during the twenty years the dam had been erected by A. and acquiesced in by B. In other words, that A. could not set up a more extended right than he had been actually enjoying with B.'s consent for twenty years.

Held also, that the fact of B. having paid A. a sum of money for one year or more, to be allowed to enter upon A.'s land and let down the water to his (B.'s) mill, was no concession by B. of any exclusive right on the

part of A. to penn back the water at his dam as he pleased.

Case for withholding the water of a certain stream from the plaintiff's mill.

Declaration dated 30th September, 1847.

rst Count: That plaintiff was possessed of a grist-mill and close, &c., and by reason thereof ought to have the advantage of the water of a certain stream, which ought, and until, &c., did flow in great abundance to said mill and close, &c.; that on the 14th September, 1841, and on divers days between that day and the commencement of this suit, defended

dant, by a dam and divers obstructions placed in said stream, impounded penned back and stopped the water thereof, and prevented it from flowing to plaintiff's mills and close, laying special damage. Then followed four other counts, varying the statement, and the fifth count admitting a right in defendant to continue a dam erected above the plaintiff's mill, alleging, that subject to the use of the water so upheld for mills above, the plaintiff had a right to the flow of the water in the natural channel, as it passed over and from such dams; and then alleging that defendant wrongfully penned back and obstructed the same.

Pleas: 1st, not guilty.

and, to first count, denied plaintiff's right to the water as claimed therein.

3rd and 4th pleas to 1st count, varying the traverse—and there were eleven pleas denying the plaintiff's right, as laid in the several counts—all concluding to the contrary.

The case was tried before Mr. Justice Macaulay, at the last Brockville assizes, when a great number of witnesses were examined on both sides from which it appeared that a stream, fed by a pond or lake, runs in rear of the town of Brockville, and enters the St. Lawrence to the westward of the town; that such stream is joined by another water-course, called the ----Creek, at a point lower down the stream than where the plaintiff's mill is situated; that between forty and fifty years ago, Daniel Jones. senior, in the first place erected a dam and grist-mill, at the point where the said stream leaves the pond, and that a dam has been continued there ever since; that within twenty years after such erections, the plaintiff erected a dam and grist-mill on the same stream, below the dam and mill of Daniel Jones; that Daniel Jones afterwards erected another dam and saw-mill at the mouth of the stream where it enters the St. Lawrence. that from the beginning, and until the defendant became possessed thereof, the waters were only retained in the pond, being the upper dam, in the first place for the use of the mill above, and afterwards, when that mill became decayed and useless, for the mill of Daniel Jones below; and all along, unless when withheld for repairs or otherwise for the use of the upper mill, the water was suffered to flow in its natural channel to the plaintiff's mill, either by escaping over the dam above or when the upper mill of Daniel Jones was in operation. The water could not pass from the upper dam to Daniel Jones' lower mill without passing the plaintiff's mill; and the plaintiff. from the time of the erection of his mill, or those under whom he claims, and for more than twenty years before the time when, &c., had been accustomed to receive a supply of water, and to use it for his mills, without any interruption otherwise than as required and occasioned for the purposes of the mills of Daniel Jones, who by long enjoyment had acquired the prior right to that extent.

It was shewn to be greatly to the advantage of the plaintiff, and others

who have since erected mills on the same stream between the plaintiff's mill and the lower mill of Daniel Jones, that a head of water for summer use should be preserved in the pond or lake, by means of the upper dam, provided it is suffered to escape in sufficient quantities, and at reasonable periods, so as to supply the different mills in the stream with water.

Upon the death of Daniel Jones, both the upper and lower mill sites and mills and dams &c., came to the possession of his two sons David Jones, Esq., and the late Sir Daniel Jones, under whom, among others, the defendant, &c. Simpson rented both and was jointly possessed thereof at the same time. Afterwards David and Sir Daniel Jones made partitions of the property, David Jones receiving the lower and Sir Daniel the upper premises. Subsequently to this, and before the time when the defendant and Simpson had determined their joint occupation, the defendant acquired by the title a possession of the upper premises, while Simpson remained in possession of the lower.

The mill originally erected at the upper dam had gone to decay, and for many years no mill was in use there, except at one period, within a few years, a clothing mill establishment, by a tenant under Sir Daniel Jones; but owing to the interest of the owners in the lower mill, the upper dam had been used as a reservoir for the mill below, and the waters let down from time to time for the use thereof, so that no particular diminution of the supply or prejudice was experienced by the plaintiff, until the defendant became sole proprietor, since which the waters have been at times entirely withheld by him, in the assertion of a right to the absolute and uncontrolable monoply thereof, whereby this plaintiff has been deprived of the supply he previously and usually received.

It appeared in evidence, that for one year before this action was brought, he plaintiff and other occupants of mills on the stream, had paid the defendant a sum of money as a consideration for his letting down the water, at a period when he had no mill above and no interest in the mill below, and therefore no use for it, notwithstanding which he had refused to let if off, without compensation. Overtures of like kind were made a second season, but the parties could not agreee upon the terms, and now this action was brought to try the right.

The defendant, among other things, relied upon the payment aforesaid, &c., as conclusive upon the plaintiffs, being an acknowledgment of his right, but it was replied that it was only made under the exigencies of the occasion, caused by the wrongful withholding of the water by the defendant, and of which therefore he should not be allowed to take any advantage. In the end it was left to the jury with the other evidence, only as a circumstance and not conclusive.

The details of the evidence were very lengthy, touching the nature of the monoply usurped and enjoyed by Daniel Jones and those claiming under him on the one hand, and the nature and extent of the enjoyment of the water by the plaintiff concurrently therewith on the other; also as to the probability of his experiencing a want of sufficient water, owing to recent alterations and amendments in his own mill, and other causes than the alleged wrongful detention thereof by the defendant.

And at the close of the case the whole was submitted to the jury, who were told by the court, that as the law is now understood, a stream of water is in the first place of common right—then that the first occupant enjoying for twenty years indisputably acquired a right as against all others above or below; and that in the present case, Daniel Jones and those holding under him, had thus acquired an easement, the extent whereof it was necessary to determine. That it was one thing to acquire the absolute, unconditional, exclusive right to a controul of the wateranother thing to gain a qualified right, that is, so far only as might be essential to the purposes for which it had been originally monopolized, if it did not extend to the absolute right to withhold the water in the discretion of the occupant; as for example, to supply a mill with a cer tain head of water, without otherwise obstructing or diverting it. That in the present case, the owners of the upper mill first dammed up the water for the use of a mill, concurrently with which, the same owner possessed a dam and mill below, and used and enjoyed the upper dam for the benefit of both. That the plaintiff's dam and mill were erected below the upper one; but above and before the lower one, and within twenty years from the first erection of the former, so that as against all others two acts of occupancy were running together. That thenceforward the enjoyment was pari passu, only that the plaintiff received the water subordinate to Daniel Jones' prior right-at second hand as it was-but still receiving it from time to time and day by day as the upper mill was at work, or the water otherwise suffered to descend in the natural bed of the stream. That to whatever extent Daniel Jones, &c., had enjoyed un disputed and uninterrupted for twenty years and upwards, a permanent right was acquired, unless afterwards relinquished or lost, which did not appear, so that the question was, what did he thus acquire the first twenty years, no material addition to an abridgment thereof since appearing. At all events that it could not be increased without twenty years' user of the excess. That if the jury was of opinion (and it was left open to them so to find on all the evidence) that Daniel Jones. &c., had occupied and retained for twenty years before action brought or more, the unrestricted absolute controll, use, and right to the water so as to entitle him to withhold it ad libitum in toto, indefinitely and permanently at his pleasure—to find for the defendant; but that if he had only acquired a narrower right, consistently with which existed a subordinate right in the plaintiff which had been infringed by the defendant, the plaintiff was entitled to recover.

Mr. Justice Macaulay further remarked, that a dam above, holding water for the use of the mill, but letting it down as the mill is used in the ordinary course of such business for twenty years, did not confer a right to retain it indefinitely from a mill below, that had been used to receive

the escape water as so used. That so far as necessary for the purposes of the mill, to the extent of its full enjoyment, the defendant seemed to have the right, but that did not follow that he could arbitrarily stop the waters when there was no mill, or while it remained permanently idle. That the question might be thus put: did the plaintiff retain or acquire with the defendant's acquired right, a concurrent right to the surplus or waste water, to be let down as the upper mill was used, and not to be withheld except for the bona fide purpose of its use or repair, &c. That so far as the water retained bona fide for the purposes of the mill or building, or repairing, he was entitled; but if held back for other purposes, either to exact rent or vexatiously, he was not so entitled, unless such withholding absolutely and unconditionally has been sanctioned by twenty years' use.

The jury retired, and after the lapse of some time returned to the court to ask a question, previous to which the counsel for the plaintiff and the defendant were sent for and in attendance. The question was thus worded, "some of the jurors wish to know, whether twenty years peace- able possession of the dam, gave the possessors full controul of the stream? they think that because the original possessor did as he chose with the dam, that he could have stopped the dam entirely, had he been "so inclined."

The learned judge explained his views to the effect above stated, and after some discussion, the jury retired again, and the defendant's counsel withdrew; but the plaintiff's counsel did not think the jury understood him in the sense intended, whereupon he made a written note at the foot of the question, which the counsel expressed himself satisfied with. The defendant's counsel was sent for. but declined re-appearing, and then the court sent for the jury and read to them the minute as follows: "In my opinion the defendant is entitled to the possession "only as enjoyed for twenty years; the dam, though it gave him full "controul of the stream for the purposes of the mill, would not give "him the absolute right in abridgment of what the plaintiff enjoyed "concurrently. Though he did as he chose with the dam, he could not "stop it entirely and permanently, if he had not done so for twenty "years. He could only continue as of right to the same extent as he "had enjoyed for twenty years; so the plaintiff is entitled to the water "as he received it for the same or any twenty years during which the "defendant contends he acquired his right. The defendant seeks to "abridge the natural right of the plaintiff, he can only do so to whatever "extent it has been abridged for twenty years, if the abridgement in the "opinion of the jury has been exclusive, entire, absolute, find for the "defendant; if partial only, though extensive, yet if not total, if the "plaintiff still enjoyed a part of his natural right, that far he continues "entitled, and if prejudiced therein by the defendant he is entitled to an "action."

The jury, after being out all night, found a general verdict for the plainiff, and 5l. damages.

Hagarty obtained rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, and for misdirection.

Richards shewed cause.

The authorities cited were—11 A. & E. 571; 5 B. & Ad. 1; 6 E. K. 208; 6 Bing. 379; 14 M. & W. 789.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff has obtained in this case a verdict for 5l. damages, for wrongfully obstructing the flow of water to the plaintiff's mill; and the defendant has moved to set the verdict aside, as being contrary to law and evidence, and for misdirection.

An astonishing mass of evidence was given on the trial, and I cannot imagine why it should have been thought necessary, for the relation of two or three witnesses established sufficiently the points on which the case must turn; and as there was no contradiction of their testimony in any essential particular, the production of a cloud of witnesses to speak to the same fact was a useless consumption of time.

I do not see any ground whatever for excepting to the charge of the learned Judge. It was clearly correct, and the only question can be whether the jury, receiving the direction which they did, made a proper application of it to the testimony.

Their verdict is, is in my opinion, such as the weight of evidence required.

The first person who made use of the water of the stream, the late Mr. Daniel Jones, enjoyed the privilege of keeptng back the water by his dam, which was near the point where the stream issues from the pond or lake, without his right being questioned by any one; and for some few years there was no one having a mill lower down the stream, nor any one whose convenience could be interfered with by the privilege which Mr. Daniel Jones had assumed.

When the proprietor of the present plaintiff's land came, a few years afterwards, and put up a mill lower down the stream, I can easily believe that he may not have been aware that Mr. Daniel Jones had no right, by reason merely of his prior occupation, and his employment of the water of the stream above, to obstruct it in its natural flow, so as to diminish its value, either for the purposes of machinery or otherwise, to those who might come at any time within twenty years and occupy a position lower down.

I can believe this, because it appears, from the testimony of some of the witnesses examined, that they had even at a later period no clear understanding of the principles of law which regulate these rights. If, however, Mr. Buell, the first occupant of the plaintiff's site on the stream, had, from ignorance of his right or indifference to it, allowed Mr. Jones and his successors to do what this plaintiff complains of, for 20 years, without interruption, there is no doubt that Mr. Daniel Jones and his successors would thereby have acquired a perpetual right to enjoy the same privilege; in other words, an easement.

But it is not strange that Mr. Buell and his successors did not com

plain of what was in fact done for more than twenty years successively; for the dam at the head of the stream, and just below the pond, was of great use to them and very much increased the value of their site, by withholding surplus water at some seasons and reserving it to be used gradually in time of scarcity, and by enabling them in dry seasons to collect a sufficient head to allow of the occasional use of their mills at intervals, when, if the stream had been permitted to flow from the small lake or pond in its natural course, there would at such seasons be never enough for any valuable purpose. The nature of the ground above admitting of a large pond being formed and much surplus water retained, made this accommodation as easy as it was desirable.

Of course this power of controlling the water at the upper dam was capable of being abused, but it was not likely to be so as long as Mr. Daniel Jones had a mill at the upper site, actually in use, and of course requiring him, for his own purposes generally, to let the water down whenever it was collected in sufficient quantities. And as he had also a saw mill at the mouth of the stream, where it empties into Lake Ontario, which it was probably of more consequence to him to keep going than the upper mill there was an additional security that he would not vexatiously and unnecessarily detain the water in the pond.

After many changes and the lapse of fifty or sixty years, it has happened that the uppermost mill of Mr. Daniel Jones has been suffered to go into decay, leaving the dam there obstructing the water, but without any occasion at that point for using it; and the property on the site and the mills at the mouth of the stream, which were held by the same person, are now vested in different parties. The defendant became the proprietor of the site next the pond; and not having a mill there, and having no motive at the time for letting down the water, while he still maintained the dam which held it back, the plaintiff had not the same assurance that he would be allowed to participate in the reasonable use of it, by its being allowed to flow past him for the use of the mills above and below.

The complaint is, that in consequence he has been for two or three years past vexatiously deprived of the water, by its being withheld at seasons when it need not have been detained, and when it never used to be detained, and when the stream if allowed to flow in its natural course would have given him an abundant supply.

The defendant, it appears, has set up the claim of a right to obstruct it as he pleases, without regard to the quantity of water, and in fact to make his consent to part with it for the use of those below a source of profit to himself, by exacting as much money as he chooses for permission to let it flow.

The evidence does not, in my opinion, support such a right, while it establishes clearly that the defendant has within a late period taken upon himself to insist upon and exercise that right, and to keep back the water in a manner, and to an extent, clearly not sanctioned by 20 years use.

Whether the defendant was proved to the satisfaction of the jury to have exceeded of late years, in his control of the water, the privilege which had been conceded formerly, was the very point expressly submitted to the jury, and clearly put to them. They took ample time to deliberate upon it; and in determining that the plaintiff had committed this wrong, they seem to me to have given a verdict well warranted by the evidence.

What seems to have occasioned some doubt with the jury, was the consideration whether the defendant's right, as exercised from the first by the proprietor of the uppermost mill, was not in fact a right to keep back the water as he pleased; and if so, the right could not be correctly said to be exceeded, by his determining in his discretion to keep it back at any time more than he had ever done before. The defendant's counsel, of course, struggled to produce that impression on the court and jury, but in my opinion it was perfectly right not to give way to his argument.

The mere fact, that for fifty years and more the proprietor of the plaintiff's mill had acquiesced in a course, which in the general way allowed him to participate in the advantage of the stream, to an extent that a man reasonably attentive to his own interests would be satisfied with, affords no proof that he was during any part of that time assenting, or willing to have assented, to a course which would have debarred him of all use of the stream, when he might have enjoyed it as well as not, and when there could be no useful object in witholding it.

It is a plain principle of law, that any such permitted interference with the natural course of the stream, however long enjoyed, is a sanction only for a continued interference to the same extent, not for the assumption of a more extended privilege, still less for an unqualified dealing with the stream without regard to the rights of those below.

In addition, however, to the stress laid upon the mere fact of former user, with the necessary allowance of a considerable discretion, as laying the foundation for a claim to the use of the stream, at the arbitrary discretion of the defendant, the defendant relied upon former compromises made by the plaintiff and others, with him, and with those who had preceded him in the title, as being clear admissions of the right to the full extent now claimed. It was shewn that, on different occasions, the plaintiff and others had consented to pay a small annual tribute to the defendant, for being allowed to control, his (the defendant's) dam as he pleased (that is, as they might think most for their own convenience, and without regard to his); but that fact could have no such effect as the defendant desired to derive from it; for, besides that these were small payments proved to have been reluctantly made in order to remove an annoyance which they complained of, by a less expensive course than by an action at law, it is by no means correct to say, that the purchasing by the plaintiff from the defendant of the right to do in any particular year what the plaintiff might choose, in regard to the defendant's dam and gate, involved an admission that, without such an arrangement, the defendant had the full right to do whatever he pleased in keeping back or letting down the water.

It must be remembered that the dam, being on the defendant's land, was his property; maintained at his expense, and resting on his soil. The plaintiff, without his consent, could not use it for any purpose; and the right therefore to control and manage it, for the defendant's own purposes, and according to his pleasure, was something that the plaintiff could not possibly have pretended to, upon any other principle than the defendant's choosing voluntarily to grant it to him. By applying for that privilege and obtaining it for a valuable consideration to be paid, it cannot with any degree of reason be said that the plaintiff must be supposed to have consented to the defendant at all other times keeping back the water at his pleasure, and without regard to the right of any person below him.

There is no necessary connection between the plaintiff purchasing the right of opening and shutting the detendant's gates as he pleased, and the admission of the defendant's right without such purchase to make use of the dam and gate, without regard to any body's interest but his own.

The verdict was consistent, we think, with the weight of evidence so far as regards the question of fact, whether the defendant had not monopolised the water from 1945 downward, to a greater extent than had been done before by the proprietor of the same site.

Per Cur.-Rnle discharged.

Dougall v. Post

Delaration by the holders of a note, payable to A. B., or bearer, against the maker. Plea: that A. B. and others in collusion with him, obtained the note declared upon by fraud, &c. Upon this pleading, the judge of the district court refused to allow the defendant to prove that the original note, for which the note sued upon had been substituted, had been fraudulently obtained from the testator (the executor having given the note sued upon), by a party who had no connection with the note in suit; and Held per Cur., dismissing the appeal from the court below, that the evidence had been properly rejected.

Appeal from the district court of the district of Prince Edward.

Declaration. The holders of note of 181, payable to A. B. or bearer, against the maker, Lavinia Post, alleging an assignment and delivery of the said note by A. B to the plaintiffs.

Plea: That the said note in the said declaration mentioned, was obtained by the said A. B. and others in collusion with him, by fraud, &c., and that the plaintiffs had notice thereof before the transfer, &c.

It appeared in evidence, that one Peter Post had given a note for 60l, payable to C. D.; that Peter Post died, and that subsequently Lavinia Post, his executrix, gave the note sued upon and another note of 50l. as substitutes for the note of 60l. which had been given up to her. And the defendant offered at the trial in the district court, evidence to prove that the original note was obtained by C. D. by fraud, from Peter Post, and

that A. B. procured the note sued upon as the agent of C. D. this evidence was objected to and refused by the judge, and upon a rule nisi being obtained for a new trial on the ground of misdirection, it was discharged by the court below.

This judgment was appealed from.

Fitzgerald, of Picton, for the appeal. McDonald Q, C., of Kingston, contra.

The authorities cited were, I Bing, N. C. 465; I Cr. M. & R. 849; I Q. B. 349.

ROBINSON, C. J., delivered the judgment of the court.

We think the course taken at the trial in the district court was correct, and that the evidence could not have been properly received which was offered, not for the purpose of proving that the note sued on was obtained by the defendant per fraudum as pleaded, but that the note which the defendant's testator had given, and for which this note of the defendant was taken as a substitute, was fraudulently obtained from the testator by a party who had no connection with this note sued on.

It is clear, too, from the evidence given, that the defence attempted to be set up, could not be sustained.

Per Cur. - Appeal dismissed with costs.

PLAYTER V. TURNER.

Declaration. Payee against the maker of a.note for 50l., dated the 24th Dec., 1844, and payable three months after date. Plea, as to 24l.14s.3d., parcel, &c., accord and satisfaction by the defendant accepting an order on the 6th of March, 1847, in favour of J. C. Spragge, as required by the plaintiff; and as to the residue, a set-off. Held, per Cur., on demurrer to plea.—Plea bad, 1st, in leaving unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the period of two years and more, which had elapsed between the day when the note became due, and the time of giving the order; and 2ndly, in not giving at length the Christian names of J. C. Spragge, or stating that he was described in the order as J. C. Spragge.

Declaration. 1st count, paying maker of a promissory note for 50l., dated 24th Dec., 1844, and payable three months after date.

2nd count: goods sold and delivered. Interest. Damages 300l.

2nd plea: And as to the sum of 22l. 14s. 3d., parcel, &c., that heretofore, to wit, on the 6th of March, 1847, the plaintiff made his certain order in writing, bearing date the day and year aforesaid, and thereby required the defendant to pay to J. C. Spragge, the sum of 22l. 14s. 3d., which said order the said defendant then accepted and delivered to the plaintiff, &c., who accepted the same for and on account of, and in payment of the said sum of 22l. 14s. 3d., parcel, &c., whereby the defendant became liable to pay the said J. C. Spragge, &c.—and as to the residue of the said sum of money in the declaration mentioned, a set-off concluding thus: "and which said sum of money so due and owing from the plaintiff to the defendant, exceeds the damages sustained by

"the plaintiff by reason of the non-performance by the defendant of the said several promises mentioned, and out of which said sum of money so due and owing from the plaintiff to the defendant, he the defendant is ready and willing and hereby offers to set-off and allow to the plaintiff the full amount of the said damages, according, &c."

Demurrer to 2nd plea: because it was alleged that the defendant accepted an order drawn on him by the plaintiff in favour of one J. C. Spragge, without setting forth the Christian names of the said J. C. Spragge, on averring that they were unknown to him. 2nd, because the first part of the plea was no bar to the cause of action, to which it was pleaded.

Durand for the demurrer. Galt contra.—Levy v. Webb, 15 Law Jl. Q. B., was cited.

ROBINSON, C. J., delivered the judgment of the court.

This plea is defective, because it is offered as a defence to the action, and it leaves unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the period of two years and more which had elapsed between the day when the note became due and the time of giving the order.

The order is properly pleaded only as a defence to so much of the debt as it would cover, and then the defendant offers to set off a counter demand sufficient to bar the residue of the debt, and the damages in respect to such residue, for that I take to be the obvious construction of the plea.

It seems also to be requisite that the defendant in setting out the order should either have given J. C. Spragge his Christian names at length, or should have stated that he was described in the order as J. C. Spragge.—Levy v. Webb, 15 L. Jl. Q. B.

Several of the special causes of demurrer assigned, are clearly not good exceptions.

Per Cur.—Judgment for the plaintiff on demurrer.

BABY V. DREW ET AL.

To an action of debt on bond, against a collector of a township and his sureties, for not paying over to the treasurer of the District all monies that he should collect in the year 1846, on or before the first Monday of December in that year, the defendants pleaded—that by a certain by-law of the District Council, passed in May, 1843, it was enacted that the collector should pay his monies to the treasurer quarterly, which he did. Held, per Cur., on demurrer to plea—plea bad, as being no answer to the condition of the bond.

Debt on Bond, conditioned—that if the above bounden Martin Drew shall collect all rates and assessments of the township of Raleigh, for the year eighteen hundred and forty-six, for which he has been appointed, and shall pay all monies which he shall collect, except his own per centage, to the Treasurer of the District, on or before the first Monday in December, in the said year eighteen hundred and forty-six, then the said obligation shall be void, otherwise remain in full force and virtue."

Plea-And for a further plea in this behalf, the defendant say, a certain by-law of the said district council of the Western District, made and passed on the twelfth day of May, in the year of our Lord one thousand eight hundred and forty-three, it was enacted by the warden and councillors of the Western District then in council assembled, that from and after the passing of the said by-law, each and every collector of the said Western District should at the end of each quarter from the receipt of his, the said collector's collection roll, transmit to the treasury of the said Western District, all monies collected by him, the said collector, up to that period: and the defendants in fact say, that the said by-law being so made and passed as aforesaid, the said Martin Drew, as such collector as aforesaid, did afterwards, to wit, on the twenty-first day of Decemberin the year of our Lord one thousand eight hundred and forty-six, trans mit to the said V. D. Baby, so being such treasurer of the Western District as aforesaid, the sum of two hundred and thirty-two pounds, nine shillings and four pence, of lawful money of Canada: being the full amount of all the monies collected by him the said Martin Drew, as such collector for the township of Raleigh, as aforesaid, as far as, and up to the end of the quarter ending on the thirty-first day of December in the last mentioned year, after the receipt of his, the said Martin Drew's collection roll, for the said township of Raleigh, according to the tenor and effect, true intent and meaning of the said by-law, and of the condition of the said writing obligatory in the declaration mentioned: and this the defendants are ready to verify, &c.

Demurrer—The causes of the demurrer were that the district council had no power to alter the liability of the defendants under the conditions of their bond to the treasurer, as to the time when, and the manner in which the rates were to be paid; and also that the said liability could not be altered by a by-law of the district council; and also that the said liability could not be governed in any way by a by-law of the district council, passed long before the bond was entered into

Burns for the demurrer—plea not supported.

ROBINSON, C. J., delivered the judgment of the court.

This plea is bad, in our opinion, for it neither amounts to a plea of performance of the condition, nor confesses and avoids a breach.

If the by-law made in 1843 continued in force when this bond was given, the defendant might nevertheless bind himself to pay over the rates before the first Monday in December; and he does not shew performance of another very material fact of the condition, which is that he should collect all the rates for the township. For all that he pleads, he may have neglected to collect the greater part of them. He only asserts that he has accounted in a certain way (which is not according to his condition) for what he did collect.

If the defendant conceived that the bond, being taken to account at a different period from that named in the by-law, was therefore void, he should have pleaded the illegality.

The plea besides does not shew when the defendant was appointed

collector, without which we cannot see when he ought to have paid over the money collected, even according to the by-law on which he relies as over-ruling his contract by the condition of his bond.

Per Cur.-Judgment for the plaintiff on demurrer.

DICKSON V. BOULTON.

Covenant on an Indenture made the 10th November, 1844, assigning as a breach, that at the time of making the Indenture the detendant had no title. The defendant, who was under terms to plead issuably, pleaded a derivative title to him at a period prior to the making of the said indenture. The plaintiff signed judgment, treating the plea as a nullity. Held per Cur.—Judgment regular.

ROBINSON, C. J., dissentiente.

Covenant, on an indenture, made 10th February, 1844, whereby defendant, in consideration of 250l., bargained and sold to the plaintiff four acres of land, in the township of Douro, described in the declaration, and covenant that he, the said defendant, at the time of making the indenture, was rightfully and lawfully seized of a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee simply of and in the lands so described, and had good right to sell and convey the same; and covenanted also in the usual terms that the plaintiff should quietly enjoy.

The plaint iff assigned for breach, that at the time of making the indenture, the defendant had not in himself good right, full power, and lawful and absolute authority to grant, sell, alien and convey the said lands, &c., and every part and parcel thereof, in manner and form aforesaid: but on the contrary thereof, had not in himself good right, full power, or lawful or absolute authority to grant, sell, alien, convey or confirm a large portion of the said lands, that is to say, three acres, portion of the said lands in the said indenture contained, and in the declaration mentioned.

And for further breach, that at the making of the indentures, the defendant was not seized of a good, sure, perfect and indefeasible estate of inheritance in fee simple of and in the said land, and in every part thereof, in manner aforesaid; nor hath he the plaintiff ever been able, since the execution of the indenture, to use, occupy, possess and enjoy the said premises, but on the contrary thereof, one Z. Burnham, before and at the time of the said conveyance to the plaintiff, had a lawful title to a large portion of the said lands and premises in the said indenture mentioned, and hath ever since held such lawful title, not in any way derived from the plaintiff; that the plaintiff has never been able to obtain possession of the said lands, &c., but the same has been kept adversely from him under such lawful title as aforesaid, contrary to the covenant.

The plaintiff then laid as special damage, that he had not only been deprived of the possession, but had been obliged to pay the costs of an ejectment brought by him to gain possession of the land.

The defendant suffered judgment to go by default.

No defence was offered at the trial, and damages were assessed at 405l.

The defendant obtained a rule nisi to set aside the interlocutory judgment and assessment of damages, for irregularity, with costs, or upon payment of costs, and affidavit of merits, and for excessive damages.

The defendant filed affidavits, that before action brought, he placed in the plaintiff's hands the patent to Thompson under which the defendant claims, and a description of the land included in a prior patent to Mr. Burnham, which it was contended clashed with it; that after process was served in this action, and appearance entered, the defendant applied to the plaintiff for the patent to Thompson and the description taken from the other patent proposing to submit the patent to some intelligent lawyer for his opinion; that plaintiff then agreed to proceed. no further till he furnished defendant with those documents; that no step was taken for a long time (a year or more, until 25th September last); that the assizes were to commence on 23rd of October; that having little time to prepare for his defence, and thinking the declaration defective, he put in a special demurrer, which was set aside by a judge in chambers as frivolous; that defendant then advised with counsel as to his defence, and put in a plea, which plaintiff treated as a nullity, and signed judgment; that damages were assessed, not in accordance with the evidence or the judge's charge, but by each juror naming a sum, adding the whole together, and striking an average; and the defendant swore, that he was advised and believed that he had a good defence to the action upon the merits, and that the damages were excessive.

The defendant filed also an affidavit of Mr. Burnham, tending to shew merits on the part of the defence.

The special demurrer filed to the declaration assigned for causes, that although it was averred that the plaintiff had been obliged to pay certain costs of an ejectment, yet it was not averred that such action was tried or the merits determined.

This was set aside as frivolous, or rather it was ordered, that unless defendant should plead issuably by a day named, and pay costs, the plaintiff might sign judgment.

The plea filed, after setting out the indenture on oyer, averred that on the 16th of July, 1836, the King was seized in fee of four acres of land, being composed of the reservation in front of the north half of Lot No. 16, and the south half of Lot No. 17, in the eighth concession of the town, ship of Douro, and by the said indenture intended to have been conveyed, and being so seized, our Lord the King, by his letters patent, &c., granted the same parcel of land to one James Thompson, to hold to him, his heirs and assigns for ever, and made profert of the patent. The defendant then averred, that by virtue of the letters patent, Thompson became seized; and being so seized, on the 5th June, 1840, by indenture, of which profert is made, for certain considerations stated, did remise and

release to the defendant in his actual and lawful possession, then being, all his estate and interest of and to the said parcel of land, by the said letters patent so granted to him as aforesaid, to hold to the said defendant, his heirs and assigns for ever, concluding with a verification.

It was admitted that payment of costs occasioned by the demurrer, was waived by plaintiff's attorney, and the question was, whether plaintiff was at liberty to treat the plea as a nullity.

The verdict given exceeded the amount of the purchase-money, £250 and interest, with the defendant's costs on the ejectment, by about £50.

H. J, Boulton, Q. C,, in support of his rule.

Dalton shewed cause.

The authorities cited were—3 Chitty Prac. 579; 2 Dowl 47; 11 M. & W., 487; 6 M. & W. 622; 2 Pres. Conv. 284; Burr, 1788; 1 Ch, Rep-711; 1 Bing. N. C. 354; 5 T. R. 152; 8 T. R. 71; 1 Saund. 60, note (E) 3 B. & Ad. 582; 6 M. & Gr. 672; 5 D. & R. 620; 9 M. & W. 457.

ROBINSON, C. J.—The plaintiff in this case assumed, that if the plea filed by the defendant must be held bad upon general demurrer, the plaintiff might treat it as a nullity and sign judgment; but he has taken the practice to be more strict with regard to the effect of the undertaking to plead issuably then any case which he cited, or so far as I know any adjudged case will warrant.

The case of Thelusson v. Smith, 5 T. R. 152, rests the law on the principle on which I consider it to stand at present. There the defendant attempted to plead what would have been a defence, but did not plead it well, and the court held that though the defendant was under terms to plead issuably, the plaintiff could not treat the bad plea as a nullity.

This is not a case of frivolous demurrer—it is not a plea in abatement -nor do I see on what grounds the plaintiff can call on us to pronounce that it was clearly put in only for delay. It aimed, I think, at a trial upon the merits; it did not seek to rest the defence upon any collateral matter, which whether true or false, and whether well or ill pleaded, could be no defence. The case of Thompson v. Redman, 11 M. & W. 487, is not an authority to bear out the plaintiff; because there the court did set aside the interlocutory judgment, though they seemed to consider Humphreys v. The Earl of Waldegrave, 6 M. & W. 622, the plea bad. cannot be relied upon either, as supporting the plaintiff, because the defence intended to be pleaded, could be no defence, however true or All that the defendant there intended to set up as a defence, was that which a statute had declared shall be no defence, and it was not in itself a defence against the plaintiff in that cause upon the merits.

What was said by Lord Tenterden, in Sawtell v. Gillard, 5 D. & R. 620, must be taken in connection with the pleadings before him, and the facts on which he decided. For this we have Lord Tenterden's own authority, in the case of Thorpe v. Thorpe, 3 B. & Ad. 582, where his

lordship observes, "The language used in delivering a judgment, must, "like the words of any other speech or written instrument, be taken "with reference to the facts upon which it turns; it may otherwise be "applied to purposes quite different from those for which it was "intended."

In Sawtell v. Gillard, a defendant, under terms to plead issuably, had demurred for duplicity, which the court held entitled the plaintiff to sign judgment. The chief justice, it is true, thus expressed himself:-"When a party has obtained time, under terms of pleading issuably, "and by his pleading fails to bring the merits of the case, or some "question of law arising upon the facts in issue, he does not comply with "the conditions of the order." That is language very comprehensive, and very likely to be misunderstood, for if taken literally, it would seem to go the length of holding, that whenever a defendant under terms of pleading issuably, pleads a plea bad in substance, the plaintiff may sign judgment; but the case before him required no such principle to be laid down, for there the defendant had demurred for mere form; and taking the dictum literally, it stands opposed to a multitude of cases and to daily practice, Thelusson v. Smith is inconsistent with it, so is the language of C. J. Willes, in Bullythorpe v. Turner, ca. Temp. Hardwicke, 179, 481.

In Perratt v. Goddard, 9 M. & W. 457, the plea, which was pleaded as a defence to the whole action, had no application whatever to some of the counts in the declaration.

Here the plaintiff had complained that the defendant, in 1844, was not seized of a good title in the land which he then conveyed. The defendant evidently pleads a plea intended to shew that he was, which goes to the merits of the action—in fact involved the whole question of merits. He sets out a grant to one Thompson of the premises, by letters patent from the crown, in 1836, and a conveyance of the same land by Thompson to him the defendant, in 1840, in fee.

If the plaintiff could have replied, that the King had made no such grant, or that before the King granted to Thompson, he had granted the land to Mr. Burnham, or to any one else, so that nothing passed by the grant to Thompson, or if he could have denied the conveyance by Thompson, that would have drawn the case at once to a trial on the merits; and so it must have been, if the plaintiff could have shown that the defendant, admitting him to have been seized in 1840 as he alleged, had in the mean time, and before he conveyed to the plaintiff, alienated the estate; but the plaintiff's objection was, that the plea should have shewn a continuance of the estate in the defendant; in other words, that the plea is not a good plea on the face of it.

No doubt the material point is, whether the defendant was seized when he gave the covenant, nor whether he had been seized at some time before; and that the continuance of the estate required to be averred. If the plaintiff desired to take that exception, he should have demurred, I think. I do not feel authorized to say, that because the

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defendant omitted to aver a continuance of the estate, he therefore did not mean bona fide to deny the breach, or to assert his title at the time of making the indenture; in other words, that he was laying a trap for the plaintiff, and intentionally making it necessary for him to demur.

If I were so to hold, I do not know why I should not take the same unfavorable view of every other bad plea, and hold it to have been pleaded merely for delay. If there was any pretence for our saying that the defendant had alienated the estate, and therefore knew that he could not set up a contrary title under Thompson's patent, it would be different.

My opinion is, that the judgment should be set aside, and that the rule should be made absolute without costs..

MACAULAY, J.—The action here is in covenant for title at the execution of the conveyance, which the declaration denies; and to this the defendant pleads a derivative title to himself at a former period.

It is in effect the same, as if the plaintiff had alleged a want of title on the 10th February, 1844, the time of the conveyance and covenant, and the defendant had pleaded that he was seized in fee on the 5th June, 1840 It is obviously no answer to the action. No material issue could be raised. Any 1880e found for defendant would not conclude the plaintiff.

If the plaintiff had traversed all or any of the allegations contained in the plea, and gone to trial, and the issue had been found against him and in defendant's favour, he would be entitled to judgment non obstante veredicto, or there must have been a repleader—2 Saund. 319, f.; 4 B. & C. 152; 7 A. & E. 557; 7 M. & W. 62; 11 M. & W. 236; and would then, after the expense of a useless trial, be just where he was when he signed the judgment, for want of an issuable plea.

There is a hiatus in the title attempted to be shewn, and it is consistent with the plea that defendant had ceased to be entitled, if ever entitled long before the deed to plaintiff was executed.

I think the judgment regular, but on the affidavits and merits, have no objection to granting relief on payment of costs, with lease to plead de novo issuably, &c.

McLean, J., and Sullivan, J., agreed with Mr. Justice Macaulay in thinking the judgment regular.

Per Cur.—Judgment set aside on payment of costs.

FRALICK V. HUFFMAN.

To an action of covenant fo. the non-payment of 300l., on the days and times in the indenture mentioned, the defendant pleaded, that "as to "to the sum of 50l., parcel of the sum of money in the breach assigned, "the defendant saith, that before, &c., he paid to the plaintiff the sum of 50l., in full satisfaction of the sum of 50l., parcel, &c., which the "plaintiff then accepted in full satisfaction of the said sum of 50l., parcel, &c."; Held, per Cur.—on demurrer to plea.—plea good.

Declaration in covenant, for [the non-payment of 1001., payable on the 1st June, 1848.

Plea. "As to the sum of 50l., parcel of the sum of money in the breach assigned, the defendant saith, that before, &c., he paid to the plaintiff the sum of 50l. in full satisfaction of the said sum of 50l., parcel, &c., which the plaintiff then accepted in discharge of the said sum of 50l. parcel, &c.

Demurre—Ist. That while the said plea professes in its formal parts to be a plea in bar of the whole action of the plaintiff, it nevertheless contains matter, which if true, constitutes a defence to a part only of the said declaration and breach of covenant therein assigned, to wit, to fifty pounds, parcel of the said money in the said breach mentioned; and that the said plea does not contain or show any matter in denial or in confession and avoidance of the residue of the cause of action in the said declaration mentioned.

and. That there is no allegation that the said sum of fifty pounds was paid by the defendant, and accepted and received in satisfaction of the damages sustained by the plaintiff by reason of the said breach of covenant.

3rd. That it is not alleged that the said fifty pounds was paid by the deendant and received by the plaintiff in full satisfaction, after the commit ting of the said breach of covenant, so that for all that appears, it might have been paid before.

4th. That although the said plea is pleaded to a part of the plaintift's cause of action, yet there is no allegation of actionem non and of prayer of judgment, as there ought to be.

McKenzie of Kingston for the demurrer.

McDonald, Q. C., of Kingston, contra.

The authorities cited were—I Taunt 428; 8 M. & W. 228; I Q. B. R. 496; 5 Bing. 338, 3 Chitty Plg. 900; Chitty's Prec. by Pearson, 498, 489; M. & Gr. 753; 6 M. & Gr. 262; 5 B. & Al. 886.

ROBINSON, C. J., delivered the judgment of the court.

This plea appeared to me to be exceptionable, but on more particular examination I do not find that it is so.

The defendant seems according to this plea to have paid the 50l, spoken of in the plea, in discharge of so much of the debt of 350l. claimed.

To have the benefit of that payment he must plead it according to the truth. It went in fact only to discharge so much of the debt; and the defendant surely was not bound to pretend that it had any other effect.

The money was to be paid in two instalments, one of 100l., on or before the 1st of November, 1847, and the remaining 200l. on or before the 1st of June, 1848. The defendant, between these two days, paid 50l. in satisfaction of so much of the debt. It must have satisfied that amount, and the defendant pleads 1t only for that purpose.

For whatever may be due, either of the debt or damages, which the plea does not answer, or assume to answer, of course the plaintiff is entitled to judgment.

Per Cur. Judgment for defendant on demurrer.

NICHOLL V. COTTER.

A testator, by his will, desires that his executors shall sell and dispose of his land, and then "nominates and appoints his executors, their executors and administrators, to seal, execute and deliver any deeds that "may be necessary for making a title to the purchaser;" Held, per Cur., that this devise vested no interest in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold.

Trespass for entering plaintiff's close and taking away his cattle, &c.

Plea—justification under a distress for rent, setting forth, that plaintiff became tenant to one Turnbull, who died, devising the property leased to defendant as executor, with one Blackstone.

Replication -- that the said Turnbull did not devise the said property, as alleged.

A verdict was taken for the plaintiff, subject to the opinion of the court, as to whether the devise supported the plea.

The devise was as follows :-

"Thirdly. I desire that my executors hereinafter named shall and do, as soon as may be, sell and dispose of to the best advantage my farm upon Union Street, in the township of East Gwillimbury aforesaid, whose number I do not now recollect, where I have resided, and which I purchased from William Richardson." (This was the land leased to plaintiff.)

"Sixthly. I hereby nominate and appoint my executors hereinafter named, their executors and administrators, to sign, seal, execute and deliver, any deed or deeds, conveyance or conveyances necessary for the purpose of conveying all my right and title, or the right and title which is necessary to be conveyed to the purchaser or purchasers of my farm "herein aforesaid."

"Lastly. I hereby nominate and appoint George Sackville Cotter (hereinbefore named and described as Colonel Cotter,) and Henry Black-stone, of the township of West Gwillimbury, in the District of Simcoe, and province aforesaid, Esquire, executors of this my last will and testament."

Adam Wilson for the plaintiff.

Burns for the defendant.

The authorities cited were Powell on Devises, by Jarman, 244; Crabbe's Real Prop., sec. 1959, (d.); I Wm. Exors., 451; Sugden on Powers, 133; Wm, IV., ch. 1, sec. 50.

ROBINSON, C. J., delivered the judgment of the court.

I should be glad if the authorities by which we must be goverened would warrant us in holding that the will produced supports the plea; for I have no doubt that this testator did not mean that the fee simple should devolve upon his heirs-at-law, during any interval that might elapse before the sale which he was directing by his will. He imagined, I dare say, that, under the form of words used, his executors would for all purposes represent the estate until it should be sold.

The note of the learned editor of Co. Litt., 146, gives some countenance to that view of the effect of the will; but Mr. Hargrave states his opinion with great diffidence, and with an evident consciousness that it is not in accordance with the received doctrine and the weight of authority, and that, considering the point only with reference to courts of law, and not o equity, it could hardly be maintained.

The devise in this case is in the form of the most naked power, The land is not devised to the executors; it is not even devised to be sold, which is an intermediate form of expression, on which a distinction has been in some cases raised.

The will simply drsires that his executors shall sell and dispose of his land, and then "nominates and appoints his executors, their executors and administrators, to seal, execute and deliver any deeds that may be neces sary for making a title to the purchaser."

Nothing has been produced, nor I believe can be found, which would warrant us in holding this to be a devise of the estate to the executors, as it is pleaded. It vests no interest in them, but gives a mere power. The defendant fell into an error, consequently, when he destrained for rent accruing in his own time, for he was not the landlord.—Co. Litt., note 146; Cro. Car. 382; Williams on Executors, 623; Sugden on Powers, 166; Dyer, 219; Sir W. Jones, 352; Hard. 419; Powell on Devises, by Jarman, 244.

Per Cur.—Judgment for the plaintiff.

CLAPP V. MURDOFF.

The declaration on a note for 100l., claims damages for the non-payment of the note 200l. The defendant pleads as if to the whole cause of action a defence applicable to the 100l. in the body of the note, and not to the 200l. damages.—Held per Cur. on demurrer—plea bad.

The declaration charged defendant as the maker of a note payable to one Elton or bearer, for rool. transferred to plaintiff, and claimed 2001. as the damages on account of the non-payment of the note.

Plea—Except as to the several sums of 2l. 6s. 9d. and 6l. 10s. parcels of the sums of money in the declaration mentioned—a special defence as if to the whole cause of action, but covering only the 100l. in the body of the note.

Demurrer—That the said first plea professes to answer all except two certain parcels of the said sum of money in the declaration mentioned, without shewing what sum is mentioned, or is thereby referred to, and might be taken to apply to the damages as mentioned in said declaration, and not to the said promissory note, or to either of said sums, and is therefore uncertain; and also for that the said plea is not pleaded to the causes of action in respect to the sum to which it is intended to apply, and also for that being pleaded to part only of count, it should have been pleaded in further maintenance of the particular part of such count.

Smith, Q. C., of Kingston, for the demurrer.

McDonald, Q. C., of Kingston, contra.

The authorites cited were—2 U. C. R. 153; 1 Chitty Plg. 90, 91; 8 M & W. 228; 6 Bing. 595.

ROBINSON, C. J., delivered the judgment of the court.

The declaration charges the defendant as the maker of a promissory note, payable to one Elton or bearer for 100l., transferred to the plaintiff, and claims 200l. as the damages, on account of the non-payment of the note.

The defendant in the plea demurred to, undertakes to answer all for which the plaintiff is suing, except two small sums, which together amount to 8l. 15s. 9d,

If the amount thus excepted, be deducted from 200l., the damages claimed, it would leave 191l. 3s. 3d. to be answered; if deducted from the 100l., which is the mere principal sum in the note sued on, it would leave 91l. 3s. 3d. to be answered; but the statements in the plea are not suited to either view of the case, for they meet a demand of 91l. 10s.

The case of Henry et al. v. Earl, 8 M. & W. 228, does not shew the plea to be good, because there the plea was expressly confined in the introduction to what it was intended to answer, and to what it did answer.

This plea is not expressed to be intended only as a defence to 91l. Ios. a portion of the demand, but must be taken as an intended defence to all that is claimed, namely, the 200l., except 8l. Ios. 9d.: and as it shews no defence to more than 91l. Ios., it comes short of the purpose for which it is pleaded, and is therefore bad.

Per Cur.—Judgment for the plaintiff on demurrer.

GOURLAY V. GUNN ET AL.

To an action on a note by the payee against three makers, one of the defendants pleaded that at the time of the making of the said note, he the said defendant with the other two defendants were co-partners in business, and that the other two defendants being indebted to the plaintiff before the partnership, made the note declared upon in the names of all the three defendants for the payment of the said debt, without the consent of him the defendant, of which the plaintiff had notice, &c., concluding with a verification; Held, per Cur., on demurrer to this plea—Plea bad, as amounting to a denial of the making of the note, and therefore argumentative.

Semble, that if the plea had concluded with a traverse of the making of the note by the defendant, it might have been supported.

Declaration. Payee against the maker of a note.

Plea, by Gunn, one of the defendants, that at the time the said alleged promissory note was made, to wit, on the 13th day of March, 1848, he the said Daniel Charles Gourlay, and the said other defendants, John Abel Land and Thomas Routh, were carrying on the trade or business of Forwarders as co-pareners, under the name, style, and firm of Gunn, Land, and Routh, and that the said other defendants, John Abel Land and Thomas Routh, being indebted to the said plaintiff before the said

co-partnership was entered into, afterwards, to wit, on the day and year aforesaid, and after the said co-partnership was entered into, made the said promissory note in the said first count of the declaration alleged, in the names of the said defendant Daniel Charles Gunn, and of the said other defendants John Abel Land and Thomas Routh, for the payment and in respect of the said debt so due by them to the said other defendants John Abel Land and Thomas Routh alone to the said plaintiff, and not in respect of a debt relating to the said partnership, and without the knowledge, privity, or consent of the said defendant, Daniel Charles Gunn, of which premises the said plaintiff had notice, and so the defendant Daniel Charles Gunn saith, that the said promissory note in the said first count of the declaration mentioned, was made and delivered to the said plaintiff in fraud of the said co-partnership, and that the said promissory note was made and delivered for no other consideration whatever, and this the defendant is ready to verify.

Demurrer: That the said plea amounts to a denial of the making of the said note, as in the said declaration is alleged, and is in informal and argumentative traverse of that allegation, and also for that it does not appear thereby, that the said Daniel Charles Gunn did not subsequently to the making, adopt the same; and also for that it does not appear that the plaintiff had any notice that the note was given in manner and for the purpose as therein alleged at the time he received the same, but consistently with the allegation in the said plea, the plaintiff may not have had any knowledge of these facts, until long subsequently to his becoming the holder of the said note.

D. B. Read, for the demurrer.

Duggan, contra.

The case relied upon was 2 A. & E. N. S. 28

ROBINSON, C. J., delivered the judgment of the court.

The case cited by Mr. Read of Jones v. Corbett and Insole, 2 Ad. & Ell. N. S. 828, is fully in point, as determining that this plea amounts to a denial of the making of the note, and is therefore bad as being argumentative.

It seems to be admitted in that case, that if the plea had concluded with a traverse of the making of the note by the defendant, it might have been supported; and I confess I think that without that, it is a mode of pleading which it would have been more convenient to uphold, but the authority is clear and express, and we think the plaintiff entitled to judgment on the demurrer.

Per Cur.-Judgment for the plaintiff on demurrer.

Bown v. HAWKE.

Declaration on a note. Payee v. maker. Plea, (in a effect) that plaintiff took the note on the understanding that he was not to enforce it until a certain event should occur; that the event which would have entitled him to enforce it, never did occur—but on the contrary, that happened which by the agreement was to disable the plaintiff from ever making use of the note, and that the defendant was therefore excused from paying it. Replication, de injuria. Held, on demurrer to replication, replication good. Quære.—Is the plea, as stated below, good in form?

Declaration on a note for 141l. 18s. 5d. Payee against maker.

Plea, that before and at the time of the making of the promissory note of the defendant in the declaration of the plaintiff mentioned, to wit, on the 3rd of November, 1847, the plaintiff was the holder of a certain promissory note, made by one James M. Strachan, bearing date the 16th day of March, 1847, and payable nine months after the date thereof, to Messrs. Manning and Petch, or order, for the sum of 143l. currency, indorsed by the said Messrs. Manning and Petch to one Edward Musson. and by the said Edward Musson indorsed to the plaintiff, who then delivered the same to the defendant: that defendant then, at the request of the plaintiff, and in consideration of the delivery of the said promissory note to him by the plaintiff, made the promissory note in the declaration mentioned, and delivered the same to the plaintiff; and it was then agreed by and between the plaintiff and the defendant, that the plaintiff should hold the said promissory note in the declaration mentioned, until the amount of the said promissory note of the said James M. Strachan should be received by the defendant, and paid by him the defendant to the plaintiff; and the defendant says, that after the making the promissory note in the declaration mentioned, and before the same became due according to the tenor and effect thereof, to wit, on the 31st day of December, in the year last aforesaid, the amount of the said promissory note of the said James M. Strachan was received by this defendant, and paid by him to the plaintiff. And the defendant further says, that except as aforesaid, there never was at any time any value or consideration for the defendant's making the said promissory note, or for his paying the amount thereof or any part thereof, and this the defendant is ready to verify, &c.

Replication, de injuria.

Demurrer to replication.

The following exceptions were taken to the plea on the argument:—
That the agreement in said plea set forth would not be a defence to the plaintiff's action, unless the same were in writing, as the effect of it would be to alter the terms of the note declared upon, and make the same to be payable on a contingency, and not absolutely, as the note expresses; and it was not stated in said plea that such agreement was in writing. There was no entire failure of consideration set out; the use of the money, from the time of its receipt by defendant on Strachan's note until its payment to plaintiff, being a consideration pro tanto, it

was not, as it should be, expressly alleged that there was no consideration, and the plea admitted a consideration in full.

A. McLean, for the demurrer. D. B. Read,, contra.

The authorities cited were, 6 M. & G. 692; 13 M. & G. 692; 2 Bing. N. C. 579; 5 Tyr. 632; 5 A. & E. 237; 3 U. C. R. 354; Gow. 74; 3 Campb. 57; 1 C. M. & R. 686, 703; 3 M. & W. 207; 1 M. & W. 374; 4 M & W. 123.

ROBINSON, C. J., delivered the judgment of the court.

The plea in this case sets up a similar defence to that pleaded in Reynolds v. Blackburn, 6 Dowl. 19, in which case the plea was held bad, but for reasons which do not apply to the present.

If this plea be good, which I think on several grounds is questionable, it can only be held to be so as shewing that the plaintiff holds the note without value given by him, and should therefore not recover; in which case it is clear that the replication *de injuria* is a good answer, because that would be matter of excuse.

If the plea could be taken as setting up a satisfaction of the note, by the payment of the proceeds of the other note in discharge of this, then undoubtedly the replication would not be good; but though the defendant might have shaped his defence in that manner, and the facts might have supported it, yet he has not done so, for he says not a word of the money being paid or received in satisfaction, but evidently means to rely on the defence that the plaintiff only took the note on the understanding that he was not to enforce it until a certain event should occur; that the event which would have entitled him to enforce it, never did occur; but on the contrary, that happened which by the agreement was to disable him from ever making use of the note, and that the defendant is therefore excused from paying it.

The plea, even in this view, seems liable to exceptions in point of form, but it clearly admits of the answer which the plaintiff has given to it; though according to the language used by some of the judges in the many cases which may be referred to on the question, the replication de injuria would seem to be excluded, for the plea in either shape is in denial of the defendant's liability.

But we must always notice on what ground it is that the liability is denied. If it admits the contract to have been made, and to have been binding in law except on account of illegality, or want of consideration, or some collateral understanding between the parties, then the replication will be admitted.

We think that according to the weight of authority, the replication is good, and the plaintiff is entitled to judgment.

Per Cur.—Judgment for plaintiff on demurrer.

Ross et al. v. Webster.

In an action against a constable for an escape on mesne process, a count in tort and a count in assumpsit cannot be joined.

An arrest by a constable on mesne process directed to the sheriff, is not legal, by the Act 2 Geo. 4, ch. 1, sec. 9, unless the affidavit of debt be

annexed to the process.

Semble—that a constable may legally allow a debtor, whom he has arrested, to go at large, so long as he afterwards, and before the return of the writ, delivers him to the sheriff.

Declaration on two counts—one in cases and the other in assumpsit, against a constable, for an escape of a prisoner on mesne process.

Plea—That no affidavit to hold to bail pursuant to the statute in such case made and provided, was ever made or annexed to the capias ad respondendum, in the declaration mentioned, or to either of them, before or at the time of making the arrest in the declaration mentioned.

The plaintiff took issue on this plea.

The defendant demurred to the replication, but abandoned his demurrer, and then excepted to the declaration, that it had not alleged that affidavits were made and annexed to the writs; and also that there was a misjoinder of counts—the first being case, and the second assumpsit—and also, that the declaration stated the defendant's duty incorrectly—his duty being to deliver to the sheriff, and not to have the body in court.

Wm. Eccles, of St. Catharines, for the demurrer. H. Eccles, contra. The authorities cited were—10 B. & C. 222; Wragg v. Jarvis, E. T. 6 Wm. 4; Munson v. Hamilton, E. T. 6 Wm. 4; 6 B. & C. 268; I Chy. Pig.

399, 153, note g.; 3 T. R. 515; Beamer v. Darling, 4 U. C. R. 211.

ROBINSON, C. J., delivered the judgment of the court.

The defendant has abandoned his exception to the plaintiff's replication, and objects that the declaration is insufficient—for several reasons—and we are of opinion that he is entitled to prevail on the demurrer, on account of these exceptions.

The second count appears to be a count in assumpsit, and improperly joined with a count in tort (6 B. & C. 268.)

The 9th clause of 2 Geo. 4, ch. 1, besides, does not, in our opinion, make an arrest by a constable on mesne process, directed to the sheriff, legal, unless the affidavit of debt is annexed to the process; for the statute after authorizing the issuing of such process by a commissioner, requires that the affidavit shall be annexed to it, and then proceeds to say "whereupon it shall be lawful for any constable in the District to arrest the defendant."

We cannot hold that the constable equally has authority whether there is an affidavit annexed or not. The act for this purpose makes it part of the process.

Then the declaration is also defective in not averting as a breach of the constable's duty that he did not deliver the debtor over to the sheriff, for that was his duty, by the very words of the statute. When he had done that, he would be discharged whether the debtor appeared in court or not, and I consider that the constable might legally have allowed the debtor to go at large, so long as he did afterwards and before the return of the writ, deliver him to the sheriff; but whether that last point, whenever it may arise, shall be finally adjudged to be as I have now intimated or not, still for the other reasons we consider the declaration bad, and the defendant entitled to judgment.

Per Cur.-Judgment for defendant on demurrer.

McCuniffe v. Allan and Meyers.

William Allan, one of the defendants, was sued as maker of a promissory note, payable to Meyers or order, and indorser to plaintiff.

He pleaded 1st. a want of consideration for making the note—that it was made by him and indorsed by Meyers for plaintiffs' accommodation.

2ndly. That before the note was due, and after plaintiff took it by indorsement, he indorsed it over to a third party for value, who is now the holder of the note; and to whom, and not to plaintiff, the defendant is liable.

The plaintiff replied de injuria to these two pleas in one replication, which the defendant demurred to. Held per Cur.—Replication good to first plea, but bad to second plea.

Where a plaintiff replied de injuria in two pleas in one replication, which is demuared to, judgment may be given for the plaintiff on demurrer as regards part of his replication, and for the defendant on another part.

William Allan, one of the defendants, was sued as maker of a promissory note, payable to Meyers or order, and indorsed to plaintiff.

He pleaded 1st. a want of consideration for making the note, that it was made by him and indorsed by Meyers for plaintiff's accommodation.

andly. That before the note was due, and after plaintiff took it by indorsement, he indorsed it over to a third party for value, who is now the holder of the note, and to whom, and not to plaintiff, the defendant is liable.

The plaintiff replied de injuria to these two pleas in one replication, which the defendant demurred to.

Smith, Q, C., of Kingston, for the demurrer. R. P. Cooks, contra.

The authorities cited were—8 M. & W, 629, 673; 4 M. & W. 123; 7 A. & E., N, S. 402; 8 Jurist 169; 7 M. & W. 370; 5 Scott N. S. 148; 7 Scott N. S. 535.

ROBINSON, C. J., delivered the judgment of the court.

We consider that upon the demurrer the defendant is entitled to judgment, on account of the insufficiency of the replication as an answer to the second of these pleas.

It is a good answer to the first plea, which sets up matter of excuse against a prima facie legal liability; but it is not a good answer to the second, because that denies the right of action wholly on the ground that the plaintiff is no longer the actual holder of the note, and has no interest in it, or right of action upon it.

Scheld v. Kilpin, 8 M. & W. 675, is an authority in point; and on principle, as well as the authority of adjudged cases, the defendant is entitled to judgment on demurrer, so far as regards the second plea and the issue raised upon it.

That judgment may be for a plaintiff on demurrer as regards part of his replication, and for the defendant on another part under circumstances like the present, was determined by Selby v. Bardons, 3 Ad. & Ell. 741.

WHITNEY V. WOODS.

It is not necessary for a payee or an indorser in declaring upon a promissory note against the maker, to aver any express promise in addition to that which is set forth as contained in the note itself, neither is it necessary to aver any liability to pay the note.

Declaration—Indorsee against the maker of a note, alleging that the defendant made his note to A. B. or order, and thereby promised to pay, &c., and that A. B. indorsed to plaintiff, and then immediately afterwards setting forth as the breach that the defendant hath not paid, &c. without averring any express promise to pay, other than that mentioned as contained in the note itself, and without averring any liability to pay the note.

Demurrer to declaration on account of the omission of the averments above mentioned.

Richards for the demurrer. Eccles contra.

The authorities cited were—6 M. & W. 316; 11 M. & W. 475; 3 Bing N. S. 501; Bayley on Bills, 408; 2 M. & W. 734; Str. 214; 4 U. C. R. 230; 2 U. C. K. 426.

ROBINSON, C. J., delivered the judgment of the court.

It is not necessary, in our opinion, that a declaration on a promissory note by an indorsee against the maker, should aver any promise to pay, in addition to that which is set forth as contained in the note itself; in other words, it is not necessary, but; would be superfluous to aver, that the defendant promised to keep his promise—Griffith v. Roxborough, 2 M. & W. 734, and many other authorities, shew that there is nothing in this objection.

The defendant could not plead non-assumpsit, but must deny his indorsement; and it surely cannot be necessary to charge a promise which the detendant cannot deny—Sal. 128; Str. 214; Bayley on Bills, 408, are all authorities against the necessity for laying a second promise, and this even before the new rules; but since the new rules of pleading there can be no question, for besides that these disable the defendant from pleading non-assumpsit, they sanction a form which contains no

^{*4} M. & W. 123; 6 Mg. & Gr. 692; 7 M. & W. 370; 13 M. & W. 33; 5 Q. B. R. 965.

statement of a promise in a case like the present, and on that ground alone we must hold it to be unnecessary—5 Add. & Ell. 226.

But the defendant further objects that this declaration omits to aver his *liability* to pay the note. There the form given in the rules is in his favour, for that does contain an averment of liability, though the English form does not, while the English form lays a promise but certainly without necessity, which our form does not.

This difference was observed upon in our judgment in Atcheson v. Mc-Kenzie, 4 U. C. Rep. 230; where we held that the want of an averment of liability to pay in an action against the payee of a note was no objection notwithstanding the form in our new rules does contain it; for those forms were given for no other purpose than to sanction a compendious mode of declaring by authorising certain omissions, not to compel the adoption of any unnecessary allegation, which they may contain.

It has been decided in England as well as here, that it is no objection to a declaration that it does not closely follow any of these prescribed forms, provided it is sufficient upon the general principles of pleading—Lane v. Parker, I M. & W. 140; I Tyr. & Gr. 352; 4 Dowl. 705; 5 Ad, & Ell. 222; 3 M. & W. 128; 6 Nev. & Man. 128; and it is clear we think that on general principles of pleading, it cannot be necessary to allege either that the maker of a note as a distinct undertaking promised to pay the money which by the note he promised to pay, or that he was liable to pay the sum which he had expressly undertaken to pay.

It makes no difference either, we think, that it is the indorsee, and not the payee, who sues here; for by the note the defendant promised to pay the money to the payee, or to his order—in other words to his indorsee, and when the indorsement has been stated, then the promise contained in the note becomes as direct and express in the one case as it was in the other.

No case that I have seen affords any ground for drawing a distinction, but they are all against it.

Per Cur.-Judgment for plaintiff on demurrer.

GEDDES V. McCRACKEN.

Declaration on the common counts. Plea—a set-off on the common counts, and also upon a special agreement under seal to give the defendant so much per cord for cutting wood, and alleging that so many cords of wood had been cut; Held, per Cur., on demurrer to that part of the plea of set-off relating to the special agreement, that the plea was good.

Declaration on the common counts.

Plea, a set off upon the common counts, and upon a special agreement in writing under seal to give the defendant so much per cord for cutting wood, alleging that so many cords of wood had been cut, &c.

Demurrer to plea of set-off, so far as it related to the agreement, that the said defendant thereby attempted to set-off a claim sounding in damages, and thereby also attempted to set-off unliquidated damages arising from a breach of covenant; and also because the said sum of one hundred pounds upon and by virtue of the said instrument in writing could not be set off in this action, and for that so much of said plea as related to said sum of one hundred pounds was uncertain, and in other respects insufficient.

Richards for the demurrer. J. Lukin Robinson contra.

The authorities cited were, 2 Dowl. N. S. 988; II M. & W. 179; I3 Price, 434; 2 T. R. 36; I M. & W. 412; 3 B. & Ad. 580.

ROBINSON, C. J., delivered the judgment of the court.

This plea is, in our opinion, free from the exception urged against it.

The set-off claimed, is not for unliquidated damages, but especially otherwise. The price of the article sold, was fixed by contract; nothing remained to be ascertained but the quantity of wood delivered.

In that respect the demand is more a liquidated demand than the common item of set-off for goods sold and delivered.

We think also, that the claim for payment arose under the agreement pleaded at the time when the wood was corded, and that it would be contrary to reason to hold upon such an agreement as this, that the plaintiff could sue the defendant for a debt due, and insist on payment, leaving this demand unsatisfied.

If the wood was not to be paid for till after removal, it would have been otherwise, but the agreement is not so, but the contrary.

Per Cur.—Judgment for the plaintiff on demurrer.

JUSTICES OF THE DISTRICT OF HURON V. HURON DISTRICT COUNCIL.

The court refused a rule nisi for a mandamus, at the instance of the Justices of the Huron District to compel the Huron District Council, to build a court house.

In this case a rule nisi was moved for the district council of the District of Huron, by Morrison, to show cause why a mandamus should not issue ordering them to pass a by-law for building a court house for the district, and to impose a rate for defraying the expense of building the same, and to levy, collect and apply the rate for the purpose aforesaid.

Robinson, C. J., delivered the judgment of the court.

The application is made to us by the Justices of the Peace of the district, or by the Clerk of the Peace at their instance, and it is represented to us, that there has never been, and is not now any court house in the District of Huron, nor any accommodation for the courts of justice to be held therein, except a room in the upper part of the gaol, intended to be the chapel for the prisoners, but which has been hitherto allowed to be occupied and used as a court room, under the expectation that before this time a suitable court house would have been provided as in other districts.

It is not only that the place thus temporarily occupied is very unfit for the purpose as regards the approaches to it, and in other respects, but it is complained, and we have no doubt with good reason, that the making such use of an apartment assigned for other purposes interferes materially with the internal economy of the gaol, and really renders it very insecure for the safe custody of prisoners, on account of the access which is unavoidably afforded to all persons during the sitting of the courts, and the opportunity which by the arrangements of the building are thus open to strangers to communicate with the prisoners. The sheriff confirms this statement, and declares that he cannot be responsible for the safe keeping of the prisoners under such disadvantages.

This, it seems, has been repeatedly and earnestly pressed on the consideration of the district council, but without gaining their attention in any degree till very lately, when they contented themselves with answering to the effect that they are sensible of the inconveniences represented but that in the present state of the finances of the district and the great necessity there is for good roads, they cannot at present do any thing for removing them.

It is shewn that the District of Huron contains more than 20,000 inhabitants, and enjoys a revenue of scarcely less than 5000l. per annum; such at least is what the documents before us assert.

If other districts in the province less epulent and less extensive had waited until all their roads were made good by means of the district rates, before they erected their court house, two or three generations might have passed away before any attention was given to a public want which is now respectably supplied in every other district except the district of Huron; and we cannot avoid saying, that the fact of the district council having apparently so little difficulty in making up their minds to postpone indefinitely the providing suitable accommodation for the courts of justice, does seem to argue an insensibility to a great public want, which is much to be regretted.

On the other hand, it is not with a good grace that the Justices apyly to this court for a writ of mandamus to compel them to do what is required.

The statute I Vic. ch. 26, had provided properly for the erection of a gaol and court house, and contemplated their being erected and completed before the County of Huron should enjoy the privilege of being a separate district. It authorized the Justices of the Peace to borrow 6000l. on the credit of the county rates, and gave them power to collect additional rates for securing and liquidating the debt. It gave them in short, authority to use, and the legislature expected them to use, the same means by which all other districts have been enabled to provide proper gaols and court houses. Instead however, of borrowing 6000l., the jus tices, as they tell us, borrowed but 3100l.; they raised no additiona rates for this indispensable public object, though all other districts have been content to assume an additional burthen for similar purposes; they suffered the County of Huron to become a district, contrary to the plain intention of the statute, when that had not been done which the law required should be done before it could be separated from the District of London, and they now call upon this court to place the district council in contempt (for that must be the end of a proceeding by mandamus,

if compulsion should become necessary) for not doing that under a general sense of duty, and without having any means specially placed in their hands for the purpose, which the justices themselves omitted to do when it was plainly made their duty by a positive law, and a law which gave them certain and sufficient means of performing the duty.

They seem too, if I rightly understand the representations made in the papers filed before us by the Clerk of the Peace, to have omitted carrying the act into effect not from mere inattention, but from a deliberate and avowed design to avoid imposing upon the population the rate which the law intended them to bear, and which the inhabitants of all other districts have been content to bear; and in the expectation, which does not I confess, seem a very fair one, that, if they could obtain (as they state they have done) a loan from the Canada Company of some inadequate portion of the 6000l., means might be found of saving the district from charge altogether, by taxing the lands of the Company and obtaining by that means a fund to re-pay the loan which the company might consent to make to the district.

The consequence of this rather singular way of carrying into effect the statute I Vic. ch. 26, has been to leave the district for many years without those advantages which the justices now so earnestly represent the want of; and this court is asked to remedy the evil, by applying coercive measures to the District Council.

Before we could properly, do that, however, (supposing no room to exist for legal doubts as to the application of such a remedy to such a case) we should feel it just and expedient to offer an opportunity for the council themselves, or for the justices, or the inhabitants of the district, to petition the legislature for such authority as may be found wanting for attaining the object promptly and effectually.

The justices under r Vic. ch. 26, had express power to impose additional rates for this specific purpose. The District Council are not invested with any such special authority; and though the 39th and 59th clauses of the District Council Act, do give the council a general and discretionary control over matters relating to the safe custody of prisoners and the administration of justice, such as would enable them to build or repair the gaol or court house, if they have the means; yet we know that their authority ito impose taxes is not unlimited, and that they may not have, or be able, under the existing authority, to raise the funds for doing what we are asked to compel them to do. They might only be able to raise a fund for the purpose by contracting a loan (if that were legally in their power) and it might perhaps not be found easy to raise in the District of Huron a loan, with the prospect of repayment by imposing a tax on the property of the lender.

Independently of the propriety, as we think, of allowing opportunity for an application to the legislature before interfering by mandamus, there are several legal questions upon which we should have first to satisfy ourselves, and into which we do not think it necessary to enter.

The District Council is a corporate body with considerable discre-

tionary powers, and without going further into the matter, we are not prepared to hold that a proceeding by mandamus and atterwards by attachment against them is the proper course for insuring the erection of a court house.

Per Cur.-Rule refused.

DOE KING'S COLLEGE V. KENNEDY.

Where a witness stated that he has had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself, and from seeing the signature of the party whose name was attached to it, with whose handwriting he was acquainted; Held per Cur., that this evidence, though not conclusive, was sufficient to go to a jury, to

authenticate the seal.

Where the lessee covenanted to pay the yearly rent, and there was a condition in the lease "that if the tenant should do or omit anything in breach or non-performance of any of his covenants," then it should be lawful for the landlord to re-enter; Held, per Cur., that the effect of the non-payment of rent upon such a demise would be to make it, not void ipso facto, but only void upon proper proceedings being taken for that purpose; and consequently, that until such proceedings were taken, the term would subsist in the tenant, and the landlord could not maintain his title in ejectment; Held, also, that it would not be necessary for the defemdant in the action of ejectment, to shew that the lessee actually entered under his lease, for until some one else be shewn in possession holding out the lessee, he must be regarded as seized of the term.

Declaration, Hil. T., 9 Vic.; demise, 25th Sept., 1836, and Ouster, 25th Sept., 1845. Ejectment: The defendant defended for part of the west half of lot No. 11, in the 10th concession of Hungerford, claimed by the plaintiff as lot No. 10, in the said concession and township.

The plaintiffs shewed title under a government patent of grant, bearing date the 3rd January, 1828; including lot No. 10, in the 10th concession of Hungerford, with various other lots of land.

The plaintiff's title was admitted subject to the defence.

The defence set up was a lease from the lessors of the plaintiff, to Allen Munro, dated the 30th September. 1836, "for the above mentioned lot No. 10, in the 10th concession of Hungerford, being 200 acres, to hold from the 24th Sept., 1836, for twenty-one years, at a yearly rent; during the first seven years, 2l. 10s. per annum; during the second seven years, 5l. per annum; and during the residue of the term, 7l. 10s. per annum, with a covenant by the lessee to pay the rent accordingly, and keep the premises in repair, with a proviso, that for breach of all or any of the covenants, &c., before eontained on his part, &c., the lessors of the plaintiff might re-enter, &c. In witness whereof, the lessor of the plaintiff thereto affixed their common seal, &c., and said lessee his hand and seal, the day and year first above written.

(Signed) "Jos. Wells, Registrar. [%. S.]
"Allen Munro. [%. S.]

"Signed, sealed, and delivered in presence of

(Signed) "Henry Hawkins."

To prove the execution of this lease, a written admission, signed by Mr. Read, the plaintiff's counsel, was put in, that the signature of 5 U. C. Q. B.

"Joseph Wells" was his handwriting, and that Henry Hawkins, the witness, need not be called to establish that fact. Also, that the signature of Allen Munro, was his handwriting, but not that the seal to the said lease is the corporate seal of the lessees of the plaintiff, or that Joseph Wells had authority to sign the said lease.

On the defendant's part it was admitted that the rent payable by the said lease was not paid on the days and times therein expressed.

A witness (A. H. Meyers, Esq.,) was then called, and stated that he had seen the seal of the lessees of the plaintiff affixed to papers then (looking at the instrument in question) that from other papers he had seen, and the name of Colonel Wells, he took it to be the seal of the lessors of the plaintiff. That the rim of their seal is lettered, "King's College, &c."; some of which letters he perceived on theimpression in question; that he had received leases from the lessors of the plaintiff, and signed them for himself and others whose agent he was in their office.

On the back of the lease was indorsed an assignment (not proved) purporting to be from the lessee Munro, to Billa Flint, junior, dated 28th April, 1837.

In reply, it was for the plaintiff objected, 1st, that there was a forfeiture of the lease and right of re-entry for non-payment of the rent.

andly. That the demise was laid before the date of the lease, and therefore the plaintiff was entitled to recover.

Reference was made at the trial to Co. Litt. 285. a., and Doe Morgan v. Black, 3 Campl. 447.

There was no proof that the defendant, or any one but the plaintiff's lessor, was in possession between the 25th and the 30th Sept., 1836, i.e., between the day of the demise and the date of the lease. The ouster was laid long after. That entry under the lease was not shewn, or that the defendant held under it.

By mutual consent it was left to the jury to decide whether the seal to the lease was that of the lessors of the plaintiff, and to find for the defendant, with leave to the plaintiff to move to enter a verdict for the latter, if entitled to recover under the evidence.

It was intimated, that the court would have overruled the plaintiff's objections, if it had been necessary to dispose of them at Nisi Prius, and the evidence was left to the jury as sufficient to warrant them in finding the seal to be that of the lessors of the plaintiff, and they found for defendant; also, that the seal was genuine, that is, the seal of the lessors of the plaintiff.

Eccles obtained a rule to set aside the verdict for the defendant, and to enter it for the plaintiff, according to the leave reserved.

Walbridge, of Kingston, shewed cause.

The authorities cited were, 8 Q. B. R. 576; Adams on Ejectment, 54; Roscoe, 427; 8 T. R. 307, 803; 4 A. & E. 410; 12 Mod. 423; 4 B. & Ad. 315, 650.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule must be discharged. The first question that arose was, whether the defendant gave any evidence sufficient to go to the jury, upon which they could be warranted in finding the alleged demise to Munro.

The evidence of Mr. Meyers, though not conclusive and certain, was such evidence as necessarily went to the jury; he swore that he had good opportunities, which he described, of observing and knowing the seal of King's College, and he believed this to be their seal, both from the impression itself, and from seeing the signature of the late bursar to 1t, with whose writing he was acquainted.

It would be subjecting suitors in actions on foreign judgments to great embarrassment, if we were to scan too critically the testimony which has satisfied the jury in regard to the seal of the foreign court. It is sufficient to say that the jury had evidence authenticating the seal, though not conclusive; they have found the seal to be that of the corporation; there has been time enough since the trial to ascertain the truth, if there was any reason to doubt it, and no affidavit is filed denying that the lease was made by the college. From all this we can have no doubt that the fact is as it was found to be by the jury, and it would be merely harassing the parties to no purpose, to send the case to another trial upon that point, when we must be quite satisfied that the verdict must be the same.—I B. & C. 150.

Then taking the lease to have been made to Monro, it shews the estate to be out of the plaintiffs, and so bars their recovery during the unexpired term; but the plaintiffs objected that the lease can have no such effect without shewing more, and that it was necessary that the defendant should have proved that the lessee, Munro, entered under his lease; but I consider that by the lease, the term was served from the reversion, and that no one being in possession holding out the lessee, he must be regarded as seized of the term, and that the plaintiffs are not in a situation to maintain ejectment in the face of their own lease. I refer to Lutwich v. Mitton, on this point, Cro. Jac. 604.

Then the plaintiffs next contend, that the term has been forfeited by non-payment of the rent, but it is plain that this is not so. I mean that the demise has not become ipso facto void, although it is admitted that the rent has not been paid.

By the lease the lessee covenants to pay the yearly rent, and there is a condition in the lease, "that if the tenant shall do or omit any thing in "breach or non-performance of any of his covenants, then it shall be law-"ful for the plaintiffs to re-enter." The effect of non-payment of rent upon such a demise is not to make the lease void without any proceeding on the part of the landlords. They have only the power to make it void, or in other words, to regain possession by a proper remedy, grounded on the default, and in the meantime; while that has not been done, the term subsists.

The demise is laid in the record on the 25th September, 1836, and the ouster on the 26th September, 1845; and the demise made by the

plaintiffs to Munro, was made 30th Sept., 1836, to hold from 24th September, 1836, for twenty-one years; under this statement of facts, it will be seen that the alleged ouster could have been no trespass to these plaintiffs, for they had parted with their interest before the time when the ouster is stated to have taken place.

And at any rate, what the plaintiffs have contended for is the full benefit of their verdict; they have argued that they have a right to possession, which cannot be the case where the lessor of the plaintiff has alienated his estate at any time between the demise and the trial, so as to have parted with his right to immediate possession.

Per Cur.-Rule discharged.

MACFARLANE V. KEZAR ET AL.

The replication of de injuria to a plea. setting up as a defence to the note, a failure of consideration, or want of consideration—is good.

Declaration: Payee against the maker of a note.

Plea: That there was not at any time any consideration or value for making the said note in said first count of the declaration mentioned, or paying the amount thereof or any part thereof, and that the said note so made as in the first count mentioned, was given to secure the payment of the purchase money, being the amount of the said note, for the east half of lot number thirteen in the first Concession of Osnabruck, county of Stormont, sold before the making of the said note by the said plaintiff to the said Alvin Kezar, and the said Archibald Maclean, for which land the plaintiff had not then or at any time since any title, and this the said Alvin Kezar is ready to verify, &c.

7. Lukin Robinson for the demurrer. Richards contra.

The authorities cited were, 3 U. C. R. 355; 2 Dowl. & Lownd 55; 5 A. & E. 237; 13 M. & W. 23; 4 M. & Gr. 336; 6 M. & W. 84.

ROBINSON, C. J., delivered the judgment of the court.

The plea sets up as a defence a failure of consideration, or want of consideration, which is regarded as matter of excuse only, and not in denial of the contract; and the replication *de injuria* has been held to be admissible in such cases.

The plaintiff is in our opinion entitled to judgment, because his replication is sufficient, and it is not necessary to consider whether his exceptions to the plea might not have been found good.

Per Cur .- Judgment for the plaintiff.

BLINN V. DIXON.

Held, per Cur., affirming the Judgment of the court below, that the following notice of non-payment of a note:—

"London, Nov. 22, 1846." Sir, the promissory note of Peter Bowen, for 201., at three months from the

"19th day of August, 1836, on which you are indorser, is due this day "unpaid; I therefore give you notice, that as the holder of the said note

"I look to you for payment thereof.

'Your most obedient servant, "WARREN BLINN."

Given by the indorser of the following note to the indorsee:-

"London, 14th Aug., 1846.

"Three months after date, for value received, I promise to pay to Thomas "C. Dixon, or order, at the office of Warren Blinn, Esq., in London, the "sum of twenty pounds currency.

"F. P. Bowen."

was a sufficient notice to bind the indorser, without further stating that the note had been presented for payment, or dishonored.

Held also, that the notice being dated on a Sunday (the note falling due on the Saturday, and notice being delivered on the Monday), was no objective the statement of the saturday. jection to the validity of the notice.

Appeal from the district court of the London District.

Indorsee v. Indorser.

The declaration set out the following promissory note:-

"London, Aug., 1846.

"Three mouths after date, for value received, I promise to pay to "Thomas C. Dixon, or order, at the office of Warrin Blinn, Esq., in Lon-"don, the sum of twenty pounds currency.

"F. P. BOWEN."

And averred the non-payment of the said note by the said P. Bowen, though it was duly presented at the office of the plaintiff for payment, on the day when it became due, and that notice of the presentment and nonpayment by the said P. Bowen was duly given to the defendant.

1st plea: that the defendant had not due notice of the presentment and

non-payment of the said note.

and plea: that the said promissory note was duly presented on the day when it became due.

3rd plea: That the said Peter Bowen paid the plaintiff the amount of the said note. Upon all of which pleas the plaintiff took issue.

At the trial, the notice of dishonor proved, was as follows:

"London, Nov. 22nd, 1846.

"WARREN BLINN."

"Sir: The promissory note of Peter Bowen, for 201., at three months "from the 19th of August, 1846, on which you are indorser, is due this day "unpaid; I therefore give you notice that as the holder of the said note, I "look to you for payment thereof.

"Your most obedient servant.

This notice was dated on a Sunday.

The defendant objected that the notice being dated on a Sunday, and alleging that the note was due that day, was fatal to the plaintiff.

and, that the notice was bad as not stating that the note had been presented for payment or dishonored.

These objections were over-ruled. Leave was given to move for a nonsuit on them in term.

Verdict for the plaintiff.

On motion being made, and argument thereupon, in the last Otocber

Term, the judge of the district court discharged the defendant's rule, declaring that both objections were untenable.

The defendant appealed against this decision.

Becher, of London, for the appeal. Wilson, of London, contra.

The authorities cited were, 3 U. C. R. 29, 27, 2 A. & E. N. S. 388.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff was properly allowed, we think, in the district court, to recover in this action; and the judgment of the court discharging the rule nisi for non-suit must be affirmed, and the appeal dismissed with costs.

There is nothing in the case cited, of Bank of Montreal v. Grover, 3 U. C. R. 27, or Bank of Upper Canada v. Street, ibid. 29, which makes against the plaintift's recovery in the present case.

The defendant was the endorser of a note made payable to one Dixon or order, in three months, "at the office of this plaintiff Blinn, in London;" and when the note became due, he was informed by a written notice from this plaintiff, dated "London 22nd Nov, 1846," that the note was due that day and unpaid, and that the plaintiff as holder of the note (and at whose office in London it was made payable) looked to him for payment.

It is true this notice says nothing of presentment, but, it need not, because the note was made payable at the very place from whence the notice was seat, and where the maker had engaged to take it up. Its lying there nnpaid was all that it was necessary to state, for though the holder was not bound to present it there, but might have presented it to the maker in person anywhere; yet the maker having named that as the place where he undertook to meet the note, it was unnecessary to go in search of him elsewhere, for the purpose of presenting it.—14 M. & W. 44; 2 Q. B. R. 388; 2 M. & W. 799.

As to the notice being dated on a Sunday, that cannot signify, for it was given on Monday which was in due course, the note having fallen due on the preceding Saturday, the days of grace expiring on the Sunday.—I Cr. & J. 180.

Per Cur.—Appeal dismissed with costs.

O'BEIRNE V. GOWIN.

Declaration on the common counts, laying the damages at 200l. Plea—accord and satisfaction, by the payment of 3l. in full of all damages in the declaration mentioned: Held, per cur. on demurrer to plea—plea bad in setting up the payment of 3l. as a satisfaction of 200l. claimed.

Declaration. Common counts. Damages 2001.

Plea—As to further maintenance of action, payment of 3l. in satisfaction of the promises in the declaration mentioned, and of all damages sustained by the non-performance of the same, and acceptance thereof by the plaintiff.

Demurrer—That the said accord and satisfaction is too large and general, and affords no sufficient answer to the declaration; and also for that the issue tendered by said second plea is an immaterial one; and also that the plaintiff cannot take or offer any certain issue upon the said second plea, or such an issue as is sufficient to decide the merits of the action; and also for that the defendant hath not in and by his said second plea denied, confessed or avoided the substantial matter set forth in the declaration, and the promise therein set forth.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff is entitled to judgment. The defendant should have pleaded payment of 3l., and non assumpsit as to the residue, instead of setting up the payment of 3l. as a satisfaction of 200l. claimed,

Per Cur .- Judgment for plaintiff.

DORLAND V. BONTER.

Semble, that it is no defence to an action against the commander of a steam boat, for not towing, &c., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice.

Action on the case against the commander of a steam boat, for not towing, as per agreement, a scow and two barges, from the Bay of Quinte, near Adolphustown, to the port of Kingston.

Plea—That after the making of the said agreement, and before the day whereon the said scow and barges were to be towed to the said port of Kingston, to wit, on the twenty-seventh day of November aforesaid, the said steamboat of the defendant wherewith the said scow and barges were to be towed in manner atoresaid, was lying in the port of Belleville, in the waters of the said Bay of Quinte; and that by reason of the severity of the weather, the waters of the said port of Belleville, where the said steamboat was so lying, became altogether frozen over and covered with thick ice, by means whereof the said steamboat then became immoveably frozen in and surrounded by the said ice and incapable of being removed from the said port of Belleville during the remainder of the said season of navigation: and the defendant thereby was then also unavoidably prevented from performing the said agreement so made by him as aforesaid; and this the defendant is ready to verify, &c.

Demurrer—That the said plea being pleaded by way of confession and avoidance, the matters therein contained, if true, afford no legal avoidance of or defence to the plaintiff's action.

McDonald, Q. C., for the demurrer. Burrowes contra.

The authorities cited were—4 Cnmpb. 333: 3 M. & S. 267; 3 B, & P. 295; 5 Bing. 235.

Robinson, C. J., delivered the judgment of the court.

It has not been attempted to support this plea, and it is plain that the

plaintiff is entitled to judgment on the demurrer, for the defendant does not show that he was necessarily at Belleville with his tow-boat, at the time when he was frozen in, which, as he alleges, prevented his taking her to Adolphustown and performing his contract; so that this could not be a good defence, even if the principle so strongly stated in Blight v. Page, 3 B. & P. 295 note, would otherwise not have applied. But that case, as well as Barrett v. Dutton, 4 Campb. 333, shew that a detention by frost, however unavoidable, would not excuse the defendant from the consequences of failing in his contract.

Per Cur.-Judgment for plaintiff on demurrer.

DOE STEWART V. YAGER.

Where a plaintiff in ejectment gave evidence of a former possession, and recovered upon that, without being put to the necessity of proviag a paper title, and the defendant not having offered at the trial any evidence of title, applied to set aside the verdict upon affidavits, alleging surprise, but not shewing what title he could have shewn—the Court discharged his application.

In this case, the plaintiff in ejectment obtained a verdict by proving a former possession only, without proof of a paper title, and the defendant moved for new trial on affidavits filed alleging surprise.

The nature of his affidavits sufficiently appears in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

Upon reading the affidavits, and referring to the learned Judge who tried the cause, we do not find that the defendant was prevented from offering evidence of his title. He did not advance any, and does not shew that he came prepared to do so; he does not even, now that he is asking for a new trial, inform us what title he could have shewn. The plaintiff was allowed to recover upon evidence of his former possession, without being put to the proof of what is called a title, that was strictly regular, but the defendant swears that he was surprised by it. He seems to have been lying by in the hope that the plaintiff would be put to trace a title by deed, and that some flaw might be found in it, of which he (the defendant) could take advantage. But the law is not so unreasonable—the plaintiff shewed enough to entitle him to recover against a trespasser; and if the defendant is not a trespasser, but has a title, he should at least have offered evidence of it; not having done so, he must himself become plaintiff in ejectment if he is advised that he really has a legal title,

Per Cur.-Rule discharged.

HENDERSON V. WILDE.

The sheriff, upon a plaintiff refusing to indemnify, applied to the court for an interpleader order, which was granted. Pending the interpleader issue, the plaintiff offered the indemnity, and the sheriff sold and paid the proceeds to the plaintiff. Held, per Cur., upon an application by the party in whose favour the interpleader issue had been found by the jury, that the sheriff was liable to an attachment for selling the goods in violation of the interpleader order, obtained at his instance, and for his own protection.

In Trinity Term last, a rule was made in the Practice Court that the sheriff of the District of Niagara, should shew cause why an attachment should not issue against him for contempt, on account of his having, after a judge's order for interpleader was made in this case staying the proceedings thereon, for his benefit and protection, proceeded to sell the goods and chattels mentioned in the order, and claimed by one Jessop, the party named in the order, and having paid over the proceeds to the plaintiff Hender son; or why the sheriff should not pay over the proceeds of the said sale to Samuel Jessop, on the finding of the jury in favour of the said Jessopor otherwise; and why the sheriff should not answer the affidavits and papers filed.

The judge's order referred to in this rule, was made on the 25th January 1848, and was in the common form, restraining all proceedings on the execution, and directing an issue to try whether the goods seized were the goods of Jessop or of the defendant Wilde, in which issue Jessop was to be plaintiff.

The attorney for Jessop made oath that he procured the order of interpleader on the part and behalf of the sheriff; that Jessop in obedience to the order proceeded in the trial of the issue, and that a verdict was rendered for him upon the trial, affirming his title to the goods; that between the making of the order and the trial, the sheriff sold the goods and paid over the proceeds to Henderson, the plaintiff, in the fi. fa., under a bond of indemnity, alleging that he was safe in doing so, as he was indemnified by Henderson to resist Jessop's claim; that Jessop had paid the costs of the issue to his attorney, and that the sheriff had instructed the attorney to obtain the interpleader order.

The deputy sheriff made oath, that he did apply though his attorney for the order of interpleader, because the plaintiff had declined to indemnify him when Jessop claimed the goods; that afterwards the plaintiff came to him and stated that he had satisfied himself the assignment set up by Jessop from Wilde was fraudulent, an I that as the goods were of small value, he would indemnify him; that thereupon he the deputy sheriff considered that as the order was obtained at the instance, and for the protection of the sheriff, he might waive it if he pleased; that he sold the goods on the fi. fa., which brought only 16l. 2s. 9d. He said the sum coming to the plaintiff out of this, is but 9l. 7s., which he had returned as levied and for the residue nulla bona.

Lauder, of Niagara supported the rule. Vankoughnet shewed cause.

The authorities cited were 2 M. & W. 203; 3 Bing. N. C. 298; 6 Dowl 293; Sewell on Sheriff, 290; Jarvis' New Rules, 310, 311.

ROBINSON, C. J., delivered the judgment of the court.

There can be no doubt that the sheriff was bound by the rule or order of interpleader made upon his own application, and ought to have abided by the result of the issue, and not proceeded to sell the goods, merely because he was indemnified by the execution creditor. By doing so he has rendered nugatory the proceeding adopted at his own instance.

If the issue had gone against the claimant, who was called in upon the sheriff's application, and compelled to become plaintiff in order to try the question, he would have been concluded by it; and it is but justice therefore, that the issue, when determined in his favour, should be equally conclusive upon the sheriff and the execution creditor.

The court has by the statute, the fullest power to make all such rules and orders in the matter as may seem just and reasonable. That the sheriff is liable to an attachment for selling the goods in direct violation of the interpleader order, there can be doubt, and upon the return of the attachment it will be in the power of the court to direct such a course to be taken as will indemnify the claimant for the inconvenience to which he has been subjected.

Per Cur. Rule absolute for attachment.

SMITH V. TURNBULL.

A rent charge issuing out of and chargeable upon a freehold estate, and granted to a person for his life is not subject to be seized and sold as a chattel under a writ of fi. fa, against goods.

In this case, the only question upon the pleadings was, whether a rent charge issuing out of and chargeable upon a freehold estate, and granted to a person for his life, was subject to be seized and sold as a chattel, under a writ of f. fa. against goods.

A plea to this effect was pleaded in bar of the plaintiff's action, and demurred to.

Vankoughnet for the demurrer. Walbridge contra.

The authorities were—Cro. Jac. 78; I Flintoff Real Pop. 79; Sewell on Shiff. 225; I T. R. 443.

ROBINSON, C. J., delivered the judgment of the court.

We are all clearly of opinion that a rent charge issuing out of and chargeable upon a freehold estate, and granted to a person for his life, is not subject to be seized and sold as a chattel, under a writ of fi. faagainst goods; and therefore that this plea sets up no legal bar to the plaintiff's recovery.—Cro. Jac. 78; Doct. & Stu. 53; Dalton Sheriff, 127. Watson on Sheriff, 178; I Heywood, 178.

McAnany v. Meyers.

Case.—The declaration complained that the defendant, contriving and intending to injure him, caused his (the plaintiff's) horse to be driven upon certain premises, not being the plaintiff's, and without his knowledge, by means whereof the plaintiff's horse was there distrained for rent then due in respect of the premises, and which rent the defendant then knew was in arrear: and that his horse being distrained was sold, and so became lost to the plaintiff.

Plea.—That the defendant received the horse from the plaintiff's bailee and returned him to him, which returning the horse, was the same grievance

of which the plaintiff complained.

Held, per Cur., on demurrer to plea—plea bad—as amounting to the general issue of "not guilty."

Case: the declaration complained that the defendant contriving and intending to injure him, caused his (the plaintiff's) horse to be driven upon certain premises, not being the plaintiff's, and without his knowledge, by means whereof the plaintiff's horse was there distrained for rent then due in respect of the premises; and which rent the defendant then knew was in arrear: and that his horse being distrained, was sold, and so became lost to the plaintiff.

Plea: That the defendant received the horse from the plaintiff's bailee and returned him to him, which returning the horse, was the same grievance of which the plaintiff complained.

Demurrer to plea—as amounting to the general issue of "not guilty."

A. Wilson, for the demurrer.—Crooks, contra.

The authorities cited were: 2 Vin. Abr., 37; Story on Bailments, 105; 9 Jurist, 598; 8 Jurist, 894; Com. Dig. Detinue A.; Cro. Eliz. 554, 146. ROBINSON, C. J., delivered the judgment of the court.

The plea is in our opinion bad, as being only an argumentative denial of the wrong charged, and so amounting to the general issue.

The plaintiff complains that the defendant, contriving and intending to injure him, caused his (the plaintiff's) horse to be driven upon certain premises, not being the plaintiff's, and without his knowledge, by means whereof the plaintiff's horse was there distrained for rent then due in respect of the premises, and which rent the defendant then knew was in arrear: and that his horse being distrained was sold, and so became lost to the plaintiff.

The defendant says in answer, that he received the horse from the plaintiff's bailee, and returned him to him—which returning the horse, is the same grievance of which the plaintiff complains. He does not traverse the injurious act imputed to him, but sets up another case, which if it be true, is equivalent to "not guilty."—3 Stark. Ev., 1156 to 1161; I B. & Ad. 450.

Per Cur.—Judgment for the plaintiff on demurrer.

JUDGMENTS DELIVERED IN HILARY TERM, MONDAY, FEBRUARY 5TH, 1849.

Present—The Hon. J. B. Robinson, C. J.

The Hon. Mr. Justice Macaulay.

The Hon. Mr. Justice McLean.

The Hon. Mr. Justice Draper.

The Hon. Mr. Justice Court.

McNab v. Wagstaff.

In the action against several defendants, though one suffers judgment by default, the plaintiff may be non-suited.

Where the plaintiff takes up a note which the defendant had given him, and which he was bound to pay at maturity, the plaintiff may recover against the defendant upon the common count, as for money paid to his use.

Assumpsit on the common counts.

The plaintiff McNab, before entering into partnership with Riddell, sold goods to the defendants; afterwards, in May, 1845, he became partner with Riddell, and McNab's account against the defendant was entered in the partnership books of the plaintiffs, as a debt due to the firm.

The defendants had before this, given their note to McNab alone for their debt, which was discounted, and afterwards they retired these notes by giving their notes to the firm, that is, both these plaintiffs for the same amounts, or at least notes that covered the amount of their debt. These notes the plaintiffs took up at maturity,

Wagstaff and Rumore had since become insolvent, and their assignee swore that these plaintiffs claimed upon the estate with the knowledge and assent of the defendants, who admitted the debt, and authorised various payments to be made by the assignee on account.

The balance claimed was 38l. 9s. 3d. One of the defendants allowed judgment to go by default. A non-suit was moved at the trial, on the ground that there was no debt proved to these two plaintiffs, but only to McNab.

The learned judge considered that the plaintiff could not be non-suited at any rate when there was judgment by default against one of the defendants, and on that ground refused it, and the plaintiff received a verdict against one defendant and assessed damages against the other. A rule nisi was moved by Vankoughnet of Hamilton, to set aside the verdict and assessment.

ROBINSON, C. J., delivered the judgment of the court.

The practice was formerly such as the learned judge on the trial sup posed, that there could be no non-suit in an action on contract against several defendants, when one had suffered judgment by default, but it is now otherwise, since the course taken by the King's Bench, in Murphy v. Donlan et al., 5 B. & C. 178.

But the evidence given on the trial clearly supported the plaintiff's recovery on the common counts, for having taken up a note which the defendants had given to them the plaintiffs, and which defendants were bound to pay, they have a right to sue the defendants as for money paid to their use.—Burr. 359; Cowper 484, 3 T. R. 662; contra, 5 B. & C. 768.

Per Cur. - Rnle refused.

DOE DANIELS V, WEESE ET AL.

A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by *record* that the fee is in another than in his landlord.

Where a tenant takes a lease from a stranger, and undertakes to pay him rent, it is unnecessary for the lessor of the plaintiff, his original landlord, to serve him with a notice to quit, or a demand of possession.

Ejectment for lot No. 15, in the 13th concession of the township of Reach. Demise laid the 1st May, 1848: ouster, same day.

The defendant, George Weese, was formerly owner of the lot, and being seized in fee, by Indenture bearing date the 25th May, 1847, and made between him and his son, William Weese, the said George Weese "as well in consideration of natural love and affection, as also for the better maintenance, support, and livelihood of him, the said William Weese, gave, granted, aliened, enfeoffed and confirmed unto the said William Weese and his heirs lawfully descended for ever, the east half of lot No. 15, in the 13th concession of said township of Reach, 100 acres more or less, to hold to the said William Weese and his heirs lawfully descended, to the only proper use of the said William Weese and his heirs aforesaid forever, with covenant for quiet enjoyment." This deed was registered the 26th January, 1848.

At this time William resided with his father ou the premises, but afterwards kept, a tavern seven or eight miles therefrom.

On the 20th July, 1847, by an instrument or agreement in writing made at Reach aforesaid, called a contract of bargain between the said George Weese, William Weese, and Valentine Mathews, "the said Valentine Mathews was to commence working with said George Weese on shares for five years from date, the said George Weese to find a team to work the farm the whole time; each one to find his own seed—the said George and Valentine in co-partnership and co-equal, and to have an equal division of all that they can raise on the said farm:" signed by all three of them the said George, William and Valentine.

William Weese lived with his father, George Weese, until the above instrument was executed, since which the defendants have been in possession.

On the 4th January, 1848, by indenture of this date, in consideration of 250l. the said William Weese granted, bargained, sold, and conveyed, &c. the said half to the lessor of the plaintiff, Henry Daniels, in fee, with covenants for title.

The blank receipt for the purchase money was not signed, but the deed was registered on the 26th January, 1848; at this period George Weese and Valentine Mathews were in possession.

On the 25th February, 1848, by agreement under seal, between Benjamin Henderson of Reach aforesaid of the one part, and George Weese and Valentine Mathews, (the defendants) of the other part, the said Henderson "agreed to lease let, and to farm let unto the said George Weese and Valentine Mathews, the said half lot on the same conditions as the said George and Valentine then had the same premises, reserving however, the yearly rent of 31., to be paid yearly, and every year, by the said George Weese; the said lease to be and contain (meaning continue) until the full end and term of four years from the 1st of July then next, and to be entered into on or before the 15th March then next ensuing; the said lease to contain and embrace the usual formalities and covenants of a lease of freehold estate," signed, sealed and delivered by each of the three parties thereto, and executed in duplicate.

It was stated by one of the parties thereto, that Henderson claimed the premises under a title from George Weese: at this period William Weese was residing at his tavern, not on the premises.

For the defendant it was objected—1st. That the deed of the 25th May, 1847, was inoperative under the statute of uses.

2nd. That the defendants were entitled to possession under the instrument of the 20th July, 1847, which was not forfeited or rendering voidable by the deed of 25th February following, operating as a disclaimer. It was ultimately agreed that a verdict should be rendered for the defendants with leave to the lessors of the plaintiff to move to enter it for the plaintiff if, on the evidence, they should be entitled to recover.

Mr. Justice Macaulay expressed his opinion at the trial, that the deed of the 25th February, 1848, was only an agreement for a lease; that no lease was shewn to have been executed in pursuance thereof, and that it did not constitute a disclaimer entitling the lessor of plaintiff to treat the lease dated 20th July, 1847, as at an end, as voidable or forfeited.

Vankoughnet obtained a rule to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff on the lease reserved, or a new trial be had between the parties for misdirection, and the present verdict being contrary to law and evidence.

Cameron, Q. C., shewed cause.

The authorities cited were—10 A. & E. 427; 5 B. & C. 433; 9 Co. 106, (b); 1 Cr. M. & R. 237: Peake, 196; 1 M. & Gr. 135; Gow. 180; 9 M. & W. 48; 10 B. & C. 816: 9 C. & P. 773; 9 A. & E. 644; 7 Scott.

N. R. 709; Buller's N. P. 96; Vin. Abr. Estate, H. (10); Com. Dig. Forfeiture, A. 5.

Robinson, C. J., delivered the judgment of the court.

The question in this case is not whether the defendants by taking the writing which they did from Henderson, deprived themselves of the right to claim a notice to quit, or any demand of possession, before they could be treated as trespassers by William Weese or his assignee, on the principle that by taking an interest from a stranger they had disclaimed to hold under their former landlord, William Weese; but the question is, whether that act worked a forfeiture of the term of years which it was insisted the defendants held under William Weese.

It is laid down every where in books of the highest authority, that a term cannot be forfeited by an act in pais, as the taking a title from a stranger, but only by the tenant affirming or acknowledging by record, that the fee is in another than in his landlord. Com. Dig. Forfeiture A. 5.—A disclaimer by matter of record no doubt incurs a forfeiture.

The judgment of the court in Doe dem. Graves v. Wells, 10 A. & E. 427 was governed by that principle, which seemed not to have engaged attention in a previous case, 4 Tyr. 619.

But we consider here, that there really was no ground for raising the question whether the defendants had forfeited their term, for there was no term granted to them by the paper produced under the date of 20th July, 1847.

William Weese grants nothing by that instrument.

There should, we think, be a verdict entered for the plaintiff on the leave reserved; for the lessor of the plaintiff shewed a legal title, and the defendants, by taking a lease from Henderson in February, 1848, and undertaking to pay him rent, so far disclaimed holding under the lessor of the plaintiff, or William Weese, who had conveyed to him, as to make it unnecessary for the lessor of the plaintiff to treat them as persons holding by privity with him.

Per Cur.—Verdict to be entered for the lessor of the plaintiff.

DACKSTEDER V. BAIRD.

In an action of trespass qu. al. fr., where the possession was disputed, the defendant proved that the plaintiff's brother was in possession of the close, to work it for him, the plaintiff, on shares. Held, per Cur., that this agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession.

A. received from B. a power of attorney to sell lands. Under this power, A. delivered to C. a deed professing to be made as follows: between A. by and under a certain power of attorney, bearing date, &c., by and from one B., of &c., yeoman, of the first part, and C. of the other part. Throughout the deed, A. the said party of the first part was made the grantor, and the deed was thus executed. By power of attorney, bearing date 14th April, 1849.

(Signed) A. [L.S.] (Signed) C. [L.S.] Held, per Cur., that A. being the granting party in the deed, and not B.—B.'s interest did not pass by the deed. Semble, that even if B. had been made the granting party, the deed would have been inoperative, from its informal mode of execution.

Trespass qu. cl. fr. on the first half of lot 11, in the 3rd concession of Fredricksburg, in several counts, with a count for taking hay and straw.

Pleas-One not guilty to the whole.

1st. To first count—close not the plaintiff's.

and. To first count-plaintiff not possessed.

3rd. To first count-liberum tenementum.

4th.—To same count, that the close was William Merritt's, and that the defendant by his command and as his servant, entered.

To second and third counts, the same pleas.

To fourth count, for taking the hay, &c., that the hay, &c., was not the plaintiff's.

Verdict for plaintiff 101, on the first, second, third, fourth and fifth is sues, and for defendant on the issues applying to the fourth count.

Upon the trial, it became a question on the pleas of "not possessed," whether the plaintiff could be regarded as being in possession, so as to maintain trespass at the time of the alleged entry; and another point was raised, whether the defendant could be said to have supported his plea of liberum tenementum.

With respect to the plaintiff's possession, it was left to the jury to find whether either the brother of the plaintiff, or one Keyser, was at the time holding as tenant to plaintiff; or whether either, or both, were merely on the place as servants or agents of the plaintiff, and not as tenants. With respect to plaintiff's brother, he stated himself to have been placed on the premises by plaintiff, a few days before the trespass, to work it for him on shares. That is all the explanation which the evidence affords of the footing they were upon.

Keyser was a person who had been living on the place before, under the defendant, who claimed an interest in it; but it was proved that upon finding that Council, who conveyed the land to plaintiff, had gone with him and put him into actual possession, Keyser moved out, and afterwards came back and said he was willing to go under the plaintiff, and work under the direction of plaintiff's brother; and it seems that he was allowed to occupy the house on that understanding.

With respect to the issue on the fourth plea of *liberum tenementum*, the plaintiff proved that Connell, who had owned the premises, conveyed them to him by deed of bargain and sale, on 4th January, 1848.

The defendant produced and proved a common power of attorney, exexcept that it expresses to be irrevocable, from the same Connell, dated 14th April, 1847, to one Richard Lazier, empowering Lazier for him (Connell) and in his name, to sell or lease this land, and to make conveyances in his, Connell's name, for the same, &c.

Under this power of attorney, Lazier on the 11th October, 1847, made a deed of bargain and sale of this to the defendant, as upon a sale, for 250l. The deed professed to be made between Richard Lazier, by and

under a certain power of attorney, bearing date, &c., by and from one John Connell of &c., yeoman, of the first part, and this defendant of the second part. Throughout the deed, Lazier, or rather as the deed runs the "said party of the first part," is made grantor, and the deed is thus executed—

"By power of attorney, bearing date the 14th April, 1849.

(Signed) RICHARD LAZIER, [L.S.]

JOHN CONNELL, [L.S.]"

The execution of both instruments was proved.

It was denied by the plaintiff that any thing could pass from Connell under the deed to the defendant, made and executed as this was, and on this objection leave was reserved to enter a verdict for the defendant on the fourth issue, if the court should be of another opinion.

Smith Q, C., of Kingston, and Ross of Belleville, supported the rule obtained on the leave reserved.

McKenzie, of Kingston, shewed cause.

The authorities cited were—4 Nev. & Man. 25; 2 U. C. R. 26; 1 U. C. R. 150; 3 U. C. R. 172; 8 B. & C. 471.

ROBINSON C. J., delivered the judgment of the court.

The evidence, as to the plaintiff's brother, does not conclusively establish a tenancy. If the plaintiff's brother was merely to labor on the place and receive for his wages a share of what he raised, that would not make him tenant, nor shew him entitled to the exclusive possession, and the jury seemed to have thought he was holding on that footing.

With respect to Keyser, he could not be said, under the circumstances proved, to be in the actual possession of the farm, whatever may have been the fairness of his conduct in giving up the possession to plaintiff, and whatever might be the consequences of that under certain circumstances upon the trial of an ejectment. As a fact therefore, the plaintiff was possessed of the land at the time of the alleged trespass.

We see no reason for setting aside the verdict so far as regards this point of possession.

As to the issue on the fourth plea, there can be no doubt, Mr. Lazier, as the attorney of Connell, intended to make an absolute conveyance of the land to the defendant, but he failed in his intention. The manner of execution by his signature would not have had the effect of passing the estate, if Connell, the owner of the land, had been made the granting party in the deed, as he ought to have been; and if the name and seal of John Connell which appears under that of Lazier, had been even put to the deed by Connell himself, that would not have enabled the deed to pass Connell's interest, because it is not Connell but Lazier, who is improperly made the granting party in the deed.

Upon the fourth plea then, the verdict should be for the plaintiff, and the plaintiff consequently should have the benefit of the verdict he has received on the other issues.

Per Cur.—Rule discharged.

DOE UPPER ET AL V. EDWARDS ET AL.

Sale of land for taxes. The Suveyor-General made a return to the treasure of the London District, headed thus: "Township of Dorchester, Southern "Division, broken front Concessions A. and B.—South part to John "Rielly, jr., 100 acres; north part to Dudley McPhee, 200;" thus returning the 200 acres as the north part of broken front Concession A. & B., treating it as one tract, and not distinguishing how much was in Concession A., and how much in B. The treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of 22, in broken front Concession A. & B., 2 oo acres; but of his own accord opened a separate account against "north half of lot 22, in broken front B. 100 acres," and returned it as in arrear fot taxes, upon which return it was sold. It was admitted that if the assessment had been charged against the 200 acres as returned by the Surveyor-General, there had been always ample distress upon the premises; and it was proved at the trial, that the parties who had paid taxes on the lot having a title to the whole lot of 200 acres, had paid taxes on the whole 200 acres, and not separately on any part of it; Held, per Cur., that under these circumstances, the sale of the north half of lot 22 in broken front B., 100 acres, was illegal and void, on two grounds 1st. because it appeared that, notwithstanding the return made by the treasurer, there was no arrear in fact of taxes subjecting the land to sale; and 2ndly, because at the time of sale, there was a sufficient distress on the premises.

Ejectment for north half of lot 22, concession B., in South Dorchester. The lessors of the plaintiff claimed under a sale of land for taxes.

In 1802, the crown granted to one McPhee, the north half of lot 22, in ront of the 1st concession, and the broken lot 22 in front thereof, 200 acres.

The Surveyor-General's return, made to the treasurer of the District of London, was headed thus: "Township of Dorchester, Southern Division, broken front concession A. and B.—South part to John Reilly, jr., 100 acres. north part to Dudley McPhee, 200 acres;" thus returning this land as the north part of broken front concession A. & B. containing 200 acres, treating it was one tract, and not distinguishing how much land was in concession A., and how much in B.

The treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of lot 22, in broken front concessions A. & B., 200 acres," but of his own accord, it would appear, opened a separate account against "north half of lot 22, in broken front B., 100 acres." It was not shewn that he had ary official authority for assuming that what the Surveyor-General had returned to him as the north part of 12, in concession B., was the exact half, or that it contained 100 acres. He kept his account open against it, however, as a distinct tract from concession A., and returned it as being in arrear for taxes nine years up to 1st July, 1829, and in consequence, a sale took place, 1st May, 1830, and forty-five acres of the north half of lot 22, in concession B., was sold to one of the lessors of the plaintiff, Upper, for 21. 4s. 2d., the arrear of taxes and fees; and the other lessor of the plaintiff, Niles, held by title derived from him.

The two hundred acres granted by the patent to McPhee, as the north part of Lot 22, in broken front concessions A. & B. in South Dorchester.

had in the meantime always been held under one title, first by McPhee then by his assignee Steffins, then by the defendant Edwards. Steffins was living on that part of the 200 acres which formed the north part of lot 22, in broken front A., some years before the year 1825, and from thence continually, until Edwards his vendee succeeded him, who in like manner lived on that part of the 200 acres as he still does.

The north part of lot 22 in broken front concession A., was all the time uncleared and unoccupied, and no otherwise used than the uncleared part of other farms commonly are; but on the part of the 200 acres which composed lot 22, in the north part of concession A., there was a large clearing, and buildings, and stock as on other farms, and it was admitted that there was all the time ample distress on that part of the 200 acres returned by the Surveyor-General, on which the taxes might have been levied, if the assessments had been charged against the 200 acres as returned.

It was further proved by evidence of the Clerk of the Peace, and of a person who had acted as assessor and collector during parts of the period in question, that in 1820, Steffins had been assessed and paid his taxes for 200 acres in South Dorchester, of the land which he occupied 188 acres being returned for that year as uncleared, and twelve as being cultivated for 1822, 1824 and 1828, no roll could be found in the Clerk of the Peace's office, and the roll for 1827 was mutilated, the part which may have contained the entry of Steffin's assessment, being wanting; but the rolls for 1821, 1823, 1825 and 1826, contained entries shewing that Steffins, up to 1825, and Edwards after him, had been assessed and paid taxes for 200 acres in South Dorchester, the proportion of the cleared part to the uncleared increasing of course as improvements were made.

The rolls, it is singular, did not specify for what particular lot or tract any of the inhabitants were assessed; but it was not pretended that the 200 acres thus given in by Steffins and Edwards, and for which they paid taxes, were any other than the 200 acres in question, of which the north part of lot 22 in broken front concession B. formed a part.

Indeed, the collector who had received the taxes in 1825, was examined, and swore that he knew the tract well; that in 1825, and from thence till 1829, Edwards had paid him the taxes on the 200 acres, no part of which was assessed separately, but all as lot 22, in concession A., on which the house was.

It was contended, that under such circumstances, the sale of any part of lot 22, in concession B., for taxes, was illegal: 1st, because the taxes upon it were clearly not eight years in arrear, and in fact were not in arrear at all when the return was made up in 1828.

andly: because the owner was entitled, at any rate, to have the whole regarded as one tract; that the account should have been so kept by the treasurer, because the tract had been so returned by the Surveyor General, and that there being all the time ample distress on one part of the tract, it was contrary to the express provisions of the statute, and the terms of the writ to the sheriff, that he should have sold any of the land-

The jury was directed that the land being returned in the Surveyor-General's schedule as a continued tract of 200 acres, with allowance for road between concession A. and B. and without any information how many acres were in A., and how many in B., the treasurer had no authority to open an account otherwise, and could not properly deviate from the return which was by law made the foundation of the whole proceedings, and could not take upon himself to say how much was in A. and how much in B., for he had no official information enabling him to divide the tract. It was not because the whole happened to be granted to one patent, for when a patent grants lots 2, 3 and 4, for instance, in the fifth concession of a township, the taxes would no doubt be charged separately against each lot, because in the common course each lot would be returned separately in its proper concession in the Surveyor General's schedule, but it was because in this case the Surveyor General had in his schedule not distinguished between the blocks A. and B., but returned the 200 acres as one tract, embracing within it an allowance for road, and the law required the Treasurer's accounts to correspond with the schedule; that the fact of the Treasurer having done otherwise, and separated in his accounts what the Surveyor General had made one, could not deprive the owner of the tract of the protection of the law, which forbade the sale of the land, so long as there was distress on the premises, that is on any one part of the tract against which the assessment should have been charged; and that besides this objection to the sale, the assessments would seem from such evidence as was given, to have been paid in each year in respect to the whole 200 acres.

The jury found a verdict for the defendant.

Becher obtained a rule for a new trial on the law and evidence, and for misdirection. Wilson shewed cause.

The arguments of counsel fully appear in the judgment of the court. No cases cited.

Robinson, C. J., delivered the judgment of the court.

The verdict was rightly rendered, in our opinion, for the defendants.

The first ground of objection to the sale was, that Steffins, and after him Edwards, had paid the taxes imposed by law on the very land which was sold. The evidence of this, it appeared to me, was such as could leave no doubt in the minds of the jury, that upon every part of the 200 acres returned by the Surveyor-General, as north part of 22, in broken front concession A. & B., the taxes had been paid by the occupant to the officer appointed to collect them.

In the case of Doe dem. Bell, vs. Rumore, decided in this court, we had occasion to consider for the first time the effect of such evidence in rendering the public sale and the sheriff's deed given under it invalid.

The facts in that case very much resembled those before us. The collector's roll had not specified the particular lot on which the taxes were paid, except I believe as to one year, but it was placed beyond doubt by the evidence, that the taxes on the lot in question had been paid

by the proprietor, who resided all the time on the land, having abundance of property about him, on which the taxes, if they had not been paid, might have been levied by distress. The court determined in that case expressly that the title under the sheriff's sale for taxes could not be up held, if it were made to appear that there was in fact no arrear of taxes subjecting the land to sale, notwithstanding the return made by the treasurer, or that there was at the time of the sale sufficient distress on the premises.

In Doe dem. Bell v. Orr, the provisions and effect of the statute directing the sale of land for taxes, came again to be considered; also in Doe dem. Powell v. Rorison, and Doe dem. Powell v. Craig. and I think also in a case of Doe dem. Cunningham, of which I have no note.

In accordance with what has been already decided in these cases, we must hold, that if on either of those grounds the sale was made contrary to the provisions of the statute, the purchaser's title will be defeated. The clearer ground of the two seems to me to be that which relates to there being distress on the premises, and it is that ground on which we have most frequently had occasion to decide.

In my opinion, that exception was supported by the evidence in this case; for Steffins, and after him Edwards, had constantly lived on part of the 200 acres granted to McPhee by the crown, and had not only paid the taxes in respect to the whole of it, but had all the time abundance of personal property on the 200 acres; and I am clear, that considering how this property was held, and how it was returned by the Surveyor-General's schedule, no part of it could be legally sold for taxes while there were goods on any portion of it sufficient to make the amount charged as being in arrear. The Surveyor-General's report to the treasurer, made under the 12th clause of 59 Geo. III. ch. 7, returned all the numbered concessions of South Dorchester as separate concessions, in the usual manner, giving in a distinct page the several lots in each concession; but the broken front concessions, A. and B, were returned as a kind of incorporated concession, forming as it were but one range, and at least not separated in the return and given as two concessions, with lots separately numbered in each, but the same page, under one general heading of "Broken Front Concessions A and B." exhibited the lots I and 2, &c., as tracts running in every case through both concessions, and taking in all the land from the south side of B to the river Thames, which runs along the front or north side of the tract thus returned as Concessions A and B. The Concession A was thus returned as a sort of broken front to Concession B, taking in whatever land there might be in all parts between B and the river, and the return and the patent evidently shewed that the crown had described the two concessions in that manner as one continued tract, embracing within it an allowance for road at the northerly limit of Concession B.

The treasurer, receiving the Surveyor-General's list in that form, had no more right to separate those concessions upon his own imagination of their respective contents, of which he had no official knowlege, than he had to open separate accounts against the broken front of any concession where the Suveyor-General had returned it as composing all one tract with the next concession in the rear.

In that case, the proprietors of lots with broken fronts attached to them, would not be protected against having some part of their land sold for taxes, though they had constantly resided on the tract and paid taxes tor the whole, merely because the treasurer had of his own accord opened a separate account against that portion of the tract which happened to be unoccupied.

The Surveyor-General in this case had not returned a Lot 22, in Concession B, as a distinct lot against which an account was to be opened, but Lot 22—that is, one lot in Concessions A. and B.

And the 14th clause of the statute directs in express terms, that the treasurer shall keep an account for every township, &c., "according to "the list or schedule furnished by the Surveyor-General, in which "account he shall enumerate every lot or parcel of land in the township," describing the same as in the said schedule." If the treasurer had done so in the instance, his account would then have been kept, as it ought to have been, against "the north 200 acres of lot 22, in concession A. & B.," in South Dorchester. And then, independently of the grantee being able to shew that he had all along paid the taxes on the land so designated, he would have enjoyed his land safe from the danger of its being sold for taxes, because he could at all times have shewn that he was residing and had goods on part (and no matter what part) of the very tract against which the rates were charged.

The words "nerth part of lot 22 in concessions A, & B., 200 acres," clearly make the two concessions one tract, of which the north 200 acres are returned as a separate parcel; the south 100 acres being returned as another parcel. Thus the crown had divided the two concessions into unequal portions, not designating how much was in one concession or how much in another; and, by taking upon himself to open an account against a lot in concession A., not separately returned to him, and assigning to it a certain number of acres, for which he had no authority, the treasurer inadvertenly has given rise to this difficuly. The 6th clause of the 6 Geo. IV., ch. 7, expressly requires, that the treasurer in his return of lands in arrear shall specify the lot or parcel of land by the number or otherwise, as the same appears in the schedule furnished to the treasurer.

If in this case he had done so, then he would not have returned lot 22 in concession A, 100 acres, as being liable to be rated, but the north 200 acres of lot 22 in concessions A & B, and then the sheriff going with that writ would have found ample distress on the tract so described, and would have seen that he could not therefore sell any part of the land.

The Surveyor-General's schedule is made by the act the very foundation of the whole proceeding. The returns and writ not corresponing with it, have nothing to rest upon; and the defendant is not to loose his lands by their operation, when he has been in no default.

McDonald v. Brennan.

In an action for use and occupation, where it is quite evident that the defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third party—the plaintiff will be non-suited.

Assumpsit for use and occupation.

Plea, general issue.

Plaintiff non-suited.

Vankoughnet, for plaintiff, moved to set aside non-suit-contending that there was evidence which should have gone to the jury.

The facts proved, fully appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

It appeared on the trial, that one Roach, a brother-in-law of plaintiffs, had entered into some arrangement with plaintiff for this property, the nature of which did not clearly appear; but it was evident that Roach was allowed to occupy it as his own, in expectation of receiving a title, and that while he was thus in possession as owner receiving the rents and profits for his own benefit, and not accountable for rent to the plaintiff, he made a lease to this defendant, who was to pay his rent to him and not to the piaintiff.

Roach, in the meantime, had died, leaving the transaction between him and the plaintiff incomplete as respects the legal title, but it was quite evident, even on the account given by the plaintiff's witnesses, that the defendant did not occupy under the plaintiff, or by his permission either express or implied, but under Roach, who the plaintiff had allowed to deal with the property as the owner; and there was evidence that he had paid rent to one McCracken, by Roach's order, and there was besides evidence that the plaintiff had executed a deed divesting himself of his interest in the property, in order to facilitate an arrangement between Roach, then in gaol for debt, and his creditors.

We think a verdict given for plaintiff, on the evidence, would have been unwarranted, and that the non-suit was proper.

Per Cur.—Rule refused.

FOSTER V. BETTES ET AL.

To an action on a note brought by an endorser against the maker, the defendant pleaded that while A. B. was the holder of the note, he compounded by a general agreement with him, (A.B.,) and all his other creditors at 10s. in the £, which composition was afterwards paid to A. B. in satisfaction of the note and accepted, and that the note was endorsed to the plaintiff after it became due. Issue was taken on this plea by the replication of de injuria: and the evidence at the trial was not a general agreement of the defendant's creditors to accept a composition of 10s. as pleaded—but merely the fact that the defendant having become in-solvent had paid some of his creditors one rate in the pound in discharge of their debts, and to other creditors another rate.

Held per Cur.—That the evidence did not support the plea, and that a ver-

dict on the leave reserved should be entered for the plaintiff.

Assumpsit on a promissory note made by the defendant on the 20th August, 1842, for 55 dollars, payable to P. Stoddard, or order.

The defendant pleaded that while the Rochester City Bank, to whom the note was endorsed, were holders of it, to wit, on the 25th November, 1842, the defendants were brokers and failed in business, and that it was agreed between the bank and the defendants and all others, the creditors of the defendants, that the defendants should pay to the bank and to all others their said creditors a certain composition, to wit, 7s. 6d. in the pound, in discharge of their respective claims, and that the Bank and said other creditors should accept such composition in full discharge of their respective claims; that the defendants did in pursuance, &c. afterwards pay to the Bank the said composition, amounting to £5 3s. $1\frac{1}{2}d$. in satisfaction of the said note; that the bank accepted the same in full satisfaction, &c.: and that the said note was indorsed to the plaintiffs, after the same had become due.

In another plea the defendant pleaded the same defence, with this diffference only, that they stated the composition to have been at the rate of ios. in the pound.

The plaintiff replied de injuria to both pleas; and the defendants joined issue on the replication in that form.

At the trial, the evidence was not that the defendants had compounded with all their creditors at the rate of 7s. 6 d., or of 1os. in the pound, or at any uniform rate, but that having become insolvent and being indebted to various persons in Rochester, and in this Province, they compounded, paying in general 7s. 6d. in the pound, but not in all cases, at least one witness who was examined, and who as the agent for the defendants had settled some of the demands (and as he said this note then held by the Rochester Bank), stated that he thought he had settled one small demand by paying a little less; and another witness swore that the creditors in Rochester were paid 7s. 6d. in the pound (or $37\frac{1}{2}$ cents in the dollar), and that some of the creditors in Canada were paid that rate of composition, and some 1os. in the pound.

The point chiefly contested at the trial was, whether the payment to the bank was made as a composition, and accepted as such in full satisfaction, or whether it was merely so much paid on account of the note, as the plaintiff contended it was.

There was also a discrepancy with regard to the time of payment. The indorsement on the note was "paid on the within twenty-five dollars, Nov. 29, 1842," while the defendants' agent swore that he made the payment in November, 1843.

The defendants commenced the case before the jury by giving evidence in support of this plea—the plaintiff called no witnesses.

It was contended at the trial, that the defendants must fail, because the evidence did not prove one uniform rate of composition, such as either plea averred but on the contrary, shewed that different creditors were paid after different proportions, which was a variance from the agreement of composition as set out, and was besides, a proof of fraud in law,

such as made the composition void and prevented it from operating as a satisfaction.

The jury found that the note was indorsed to the plaintiff after it became due, and that being so, the Chief Justice, who tried the cause, was inclined to think that the substance of the issue upon the plea was, whether this note had been satisfied by a composition received in full discharge; and that if the plaintiff meant to rely on the composition being fraudulent, by reason of all the creditors not being treated alike, which undoubtedly is necessary in such cases, he should have replied, setting up fraud, as repelling the defence; but he did not express himself as confident on that point, and recommended a verdict to be found for the defendants, with leave reserved to the plaintiffs to move to have a verdict entered for them for rol. 13s., the balance due on the note, with interest, if the court should think that the pleas were neither of them supported by reason of the difference in the rates of composition paid to the different creditors.

The verdict was given accordingly for defendants.

Vankoughnet obtained a rule nisi to enter a verdict for £10 13s., or for a new trial on the law and evidence, and on affidavit filed.

The affidavit was of the cashier of the Rochester Bank, who swore that the sum of 25 dollars was paid on the note, 29th Nov., 1842; the note not being due till 3rd December, 1842, and that it was received in part payment of the note, and not in full satisfaction.

No reason was shewn why the plaintiff should not have given this evidence on the trial.

Vankoughnet supported the rule on the leave reserved. Eccles shewed cause.

The authorities cited were, 2 T. R. 27; 5 T. R. 513; 5 E. R. 230; 2 Stark. Ev. 16, accord note x; 11 E. R. 390; 4 B. & C. 506; Ellis Debtor and Creditor, 199, 202; 2 P. & D. 292; 1 G. & D., 646; 1 Stark. Ev. 411-5: 11 Jurist 39; 2 B. & Ad. 328; 2 Cr. M. & R. 422.

ROBINSON, C. J., delivered the judgment of the court.

We all agree in the opinion that the plaintiff in this case should be allowed on the leave reserved, to enter his verdict for 101. 13s., the balance due on the note with interest.

If the plea had merely set up as a defence, that the defendant had paid to the plaintift a certain sum in the pound, which had been accepted in full discharge of the note, that plea would clearly have been bad. The defendant knowing this, set out in his pleas certain other facts, which if proved would constitute a good defence, namely, that the sum paid and accepted was upon a general agreement for a composition entered into by all the defendant's creditors, which agreement would be legally binding on all, by reason of the forbearance which it induces, and the equal and mutual concessions made by each of the creditors. Then that alleged composition being assented to, the defence as pleaded, required to be proved on the trial, and like all other alleged contracts, to be proved as laid; but it was not so proved; on the contrary, there was

no evidence given of a general agreement of the defendant's creditors for any purpose, nothing shewn that could bind or estop any one, but merely the fact that the defendants, having become insolvent, had paid some of their creditors one rate in the pound in discharge of their debts, and to other creditors another rate, neither of them being the rate of composition mentioned in the pleas.

The defendants therefore failed, we think, in sustaining their plea, and it is on that ground alone that we allow the verdict to be entered for the plaintiff, and not for anything laid before us since the trial in the affidavit of the cashier of the Rochester Bank, which has been filed, because it is not shown why his evidence was not given at the trial on interrogatories or otherwise, as for all that appears, it might have been; we could not therefore have properly taken it as the ground for granting a new trial, though it contains a statement strongly in favour of the plaintiff's claim to recover, and the indorsement on the note of the 25 dollars being paid as in the usual way, on account, and paid in November, 1842, when the note fell due, and which was a year before the defendants were proved to have become insolvent, affords reason for apprehending that the witness who made the payment, fell into an error on the trial when he stated that he made the payment in November, 1843, though he mentioned particular circumstances which confirmed him in his recollection of the date, and his statement may have been quite true. If it was, however, it would shew some unfair practice on the part of the bank. Our judgment for the plaintiff proceeds on the legal ground.—Evans v. Powis, I Exch. Rep. 601.

Held per Cur.—Judgment to be entered for the plaintiff.

DOE QUINSEY V. JOSEPH CANIFFE.

Where a son has been allowed by his father to remain in possession of land for twenty years; and it cannot be shown that he was there as the servant or agent of the father—or had paid rent within the twenty years—or had acknowledged his title in writing, the father will lose his title, no matter what the verbal or tacit understanding of both parties, as to the real ownership, might have been.

Ejectment for a small village lot, being part of 6, 3rd Con., in the township of Thurlow.

The crown in 1802 granted the lot to Peter McDougall, whose heir William McDougall conveyed to John Caniffe, father of the defendant, in fee on 25th March, 1808, and John Caniffe, on 10th Dec., 1842, made a conveyance to the lessor of the plaintiff of the village lot, parcel of the 100 acres, under which conveyance the lessee of the plaintiff now claims.

At the trial it was endeavoured to be proved, that John Caniffe was not of sane mind when he conveyed to the lessor of the plaintiff, being 86 years old and of weak intellect from age.

According to the evidence given by plaintiff's witnesses on that point,

he would seem to have been then of competent understanding, but the case going off on other grounds, the jury gave no opinion.

The defence was, that about 26 years ago the defendant's father, John Caniffe, put the defendant in possession of all that part of the lot, No. 6, which was on one side of the river Moira, being about 100 acres, and his brother Daniel in possession of the part on the other side of the river, meaning that they should have the land, as their own, though he made no deed to them; that each went on his portion and occupied it, making valuable improvements, the defendant having put up valuable mills, dwelling-houses, &c., and laid out and sold part of 100 acres in village lots.

In 1841, about a year before he died, John Caniffe made his will by which he devised to the defendant, all the portion of land on the east side of the Moira, and to George the land on the other side, thus shewing that up to that time he had intended to confirm the gift which he seems to have made to his sons respectively.

Nevertheless, between the making of his will and his death, he made the conveyance of the village lot in question to the lessor of the plaintiff, on a sale, to be paid for in a wagon and in blacksmith's work.

To shew that he had still reserved to himself a right to deal with the roo acres as owner, and therefore could rightly make this sale, notwith-standing the defendant's long occupation of the land, evidence was given that John Caniffe exacted and received from the defendant, from time to time, what he required in flour, boards, &c., made by defendant on the premises, but there was no proof that this was claimed or given by way of rent; for all that appeared, it may have been on the reasonable ground that as he did give him the property 26 years before and meant to confirm his title by will, the defendant might well consent to let his father have what he wanted of this kind without charge.

The land, it seems, was unimproved when defendant went on it, 26 years ago, but is from its situation and advantages very valuable now, independently of the improvements made on it.

It was proved, also, that since 1830, the defendant had often acknowledged his father, John Caniffe, to be the owner, and that at various times within 20 years, his father had, with his acquiescence, had village lots laid out on the land and disposed of them.

On the other hand it was shewn that the defendant had, within the same period, sold a number of village lots as if he were himself the owner of the fee, and not his father.

It was further proved that in 1838, the defendant having been sent to Kingston, on some suspicion of being implicated in the rebellion, his father John Cnaiffe, went to the land and demanded possession, (that is, of the whole property which the defendant had occupied), from the person whom defendant had left in charge of his mill, but was refused possession by the express direction of the defendant, who afterwards returned and has always occupied the land.

The defendant rested on his 20 years' possession, or rather on John

Caniffe having been more than 20 years dispossessed; and 2ndly, on the fact that John Caniffe was actually disseised when he made the conveyance to lessor of the plaintiff.

The jury, upon the points being fairly put to them by the learned judge in his charge, found for the defendant—giving it as their opinion on the evidence that John Caniffe had been disseised for more than 20 years, and that when he made the deed to the lessor of the plaintiff, the defendant was in possession adversely claiming the fee.

Cameron, Q, C., moved for a new trial on the law and evidence.

Robinson, C. J., delivered the judgment of the court.

We think there should be no rule, but that the plaintiff should be left to bring another ejectment if he is advised to do so.

Unless the jury ought clearly to have found that the defendant was in possession as servant or agent of his father, or had paid him rent within twenty years, or acknowledged his title in writing, we cannot say that they have given a wrong verdict.

The evidence cannot be said to have established any of these points though in some respects it was strong to lead to the conclusion, that the defendant's father did not intend to divest himself of his legal estate in this property, or to deprive himself of his power of dealing with it, while he lived, and there is some reason for concluding that the defendant understood matters to be on that footing; but the rights of parties to real estate, and with reference to the effect of the Statute of Limitations, are governed by certain legal principles and not by the verbal or tacit understanding of parties. We cannot hold the verdict to be against law or evidence.

Per Cur.-Rule refused.

McKinnon v. Arnold.

A deed of partition made by a *feme coverte*, tenant in common, will not be binding on her estate, *unless* there be endorsed on the deed a certificate of her examination and consent, &c., by a judge or justice, as required by our acts, I Wm. IV. ch. 2 and 2 Vic. ch. 6.

Special Case. In this case the only point submitted to the decision of the court was, whether the interest of a feme coverte, tenant in common could be said to have passed under a deed of partition executed by husband and wife, but upon which was not endorsed a certificate of her examination and consent, &c., by a judge or justice, as required by our provincial acts, I Wm. IV. ch, 2. and 2 Vic. ch. 6.

McLean for the plaintiff. Cameron, Q. C., for the defendant.

The authorities cited were, 2 Sch. & Lef. 372; I Atk. 541; Allnut's Part. Ambl. 368; I Rep. 87; 3 B. & P. 378; Co. Litt. sec. 293, 233, 264, 170-1; Watkins on Convy. 97; 5 A. & E. 834; Loft. 414; 12 Jurist, 649, 2 Roll's Abr. 255; Litt. 299; 2 Bulst. 114; Dyer 350; Cro. Eliz. 95; Com. Dig. C. 11; Fitz. N. B. 62, F.; 4 Cruise Deed, ch. 8, sec. 9.

ROBINSON, C. J., delivered the judgment of the court.

The statute of Upper Canada respecting partition, has no effect in determining the question raised in this case. Mrs. Playter, one of the three joint devisees, being a widow, the only difficulty is in respect of the interest held by Mrs. Longstaffe under the will: she with her husband joins Mrs. Playter in the deed of partition, with the intent to relinquish and convey to Mrs. Arnold the whole interest in the Lot 20, in the 5th concession of Vaughan; but she has never been examined, nor a certificate of her voluntary assent given by any judge or justice of peace, as required by our statute, I Wm. IV. ch. 2, and 2 Vic. ch. 6.

Whether, notwithstanding this omission, her interest in the lot in question can be taken to have passed to Mrs. Arnold, is the point submitted to us. I think it was stated on the argument, that Mrs. Longstaffe has since died, so that the omission can never be supplied.

If her interest in the lot in Vaughan, as a tenant in common, under the devise in the will, was not divested by the deed which she and her husband executed, then this plaintiff, McKinnon, has not the good title which was assured to him.

The pleadings do not fairly bring up the question. The defendant Arnold bound himself, that he and his wife, Elizabeth Arnold, would upon request make and execute a good and effectual conveyance in fee simple of the said land to the plaintiff, free from all incumbrances.

The breach complained of is, that the defendant and his wife, though requested, have not made and executed a good and effectual conveyance in fee simple of the said land to plaintiff free from incumbrances. The breach follows the language of the condition. The plea of the defendant is, that he and his wife "did upon request duly execute and deliver to "the plaintiff a conveyance in fee simple of the said land, free from all incumbrances, as in the said condition contained," and he concludes to the contrary, and the plaintiff joins issue.

We are to determine, whether the plaintiff, on the facts stated, has a right to recover. If the issue raised is strictly to be regarded, the only question is, whether the defendant and his wife did duly execute and deliver to plaintiff a conveyance in fee simple of the lot in question, free from all incumbrances—not whether they did in fact convey the fee; whether, in the words of the condition, they made a good and effectual conveyance in fee simple to the plaintiff. It is not shewn that there was anything wanting in the deed stated to have been made to the plaintiff, but the point turns on their capacity to make a title; on that point our opinion is with the plaintiff. We do not find that we can determine, on any clear authority or principle, that the interest of Mrs. Langstaff in the lot in question passed to Mrs. Arnold under the deed executed by Mrs. Langstaff or her husband, but upon which no certificate has been indorsed of her examination and consent before a judge.

The English Act of Partition, 31 Henry VIII., expressly takes in the case of husbands seized as tenants in common of estates of inheritance in right of their wives, and gives a remedy by writ to compel them to make partition.

Our statute, 2 Wm. IV. ch. 35. does not notice the case of husbands seized in right of their wives, nor does it make any express provision respecting married women. The question here is not upon the sufficiency of any thing done under our statute, and therefore I should not have referred to it, except to remark, that when we find it stated in some of the early authorities, that the husband may make partition by his own act of the land held in the right of his wife, because by law he may be compelled to do it, we are to consider that if that be said of the provision made by the statute, 31 Henry VIII. ch. 1, the same argument cannot with as clear reason be founded on our statute, because that leaves unnoticed the case of husbands seized in the right of their wives, and when and how they can be compelled to make partition under our law is therefore in itself a question to be first settled.

The statute 8 & 9 Wm. III. ch. 31, in the case of femmes covertes, saves a right to them within a year after the disability is removed, to appear and plead, denying the plaintiff's right, or shewing inequality of partition. Assuming that under our statute, which contains no such saving, nor any special allusion to the estates of femmes covertes, the sheriff could, upon a proper proceeding under the act, be directed to cause partition in such a case to be made, which would be binding on the femes covert as well as on the others, it would not therefore reasonably follow that either the married woman could by her mere deed alone, or jointly with her husband, or that her husband could on her behalf, by his deed, voluntarily make a partition which would bind her estate: because it is one thing to intrust to a disinterested public officer, (Co. Litt. 171, b.) assisted by a jury, the authority to bind the interest of a married woman by a partition, and it is another thing to leave a married woman the power in such cases to bind her interest perpetually by her deed, executed with or without her husband, and without that protection against the possible influence of her husband which is provided in other cases of alienation by her.

I take it to be clear, that if it were ever competent to tenants in common (not being parceners) to make partition by agreement among themselves, by parol with livery (see Docton v. Priest, Cro. Eliz. 95 Eden v. Harris, Dyer, 350), it is not now competent to them so to make partition, but that since the Statute of Frauds, it can only be done by deed. In Johnson v. Wilson, Willes, 253, that is treated as a point quite clear.

Then the three devisees in this case are tenants in common under the will, and in our opinion there is nothing in any statute of this province that gives validity to a deed executed by a married woman jointly with her husband, for the purpose of making partition, so as to bind her inheritance, unless she has been examined and a certificate of her voluntary consent given, as in other cases of alienation. It is in fact an alienation as much as any other conveyance made upon a sale or exchange, for in this case Mrs. Langstaff had an undoubted interest under the will in the land in Vaughan, which by the deed in question she professes wholly to part with. To be sure, she receives other land in exchange, and if she

was herself examined and a certificate given in respect to the conveyance by her to the other two devisees, then the effect will be that Mrs. Langstaff took her interest in the lands so conveyed, and still retains also her own interest. But that would be equally the unjust effect in the first instance, and so far as the court of law only is concerned, of holding the deed of a married woman to be void in any case when lands or other things have been given in exchange. The remedy for reclaiming the con sideration is a distinct matter.

The general principle of the common law is clear, that a married woman cannot, by her mere deed, divest herself of her real estate, nor is her deed made effectual by her husband joining her in the conveyance, nor can her husband, by any mere deed of his, alienate her estate of inheritance.

This principle is confirmed by the express language of our statute, I Wm. IV. ch. 2, which declares that the deed of a married woman, executed jointly with her husband, for the purpose of alienating her real estate, shall not be valid, or have any effect, unless certain requisites shall be complied with, which in this case it is admitted have not been.

The question then is, is there an exception to the general rule in the case of a deed executed by a married woman and her husband, for the purpose of making a partition of real estate belonging to the wife in fee? We do not find that we can say so.

It is always necessary to bear in mind the distinction between parceners and tenants in common. In respect to the former, the common law without the aid of any statute compelled a partition, and therefore it was holden that a feme covert, or an infant being a co-parcener, could by their voluntary act make partition which would not be void-nor indeed voidable when the partition was not shewn to be unequal. But with respect to joint tenants, and tenants in common, as they were not compelled by the common law to make partition, but only under the statutes 31 Henry 8, chap. 1; and 32 Henry 8, chap. 32, so it was held that those statutes only affected partition so far as it was made by virtue of and according to these acts, and left partition made by the voluntary act of the parties to the same effect that it would have at common law, without those statutes. Then it is clear that by the common law, a husband seized, in right of his wife, of an estate of freehold as tenant in common could not by his own act bind her estate, and a deed executed by her during the coverture could have no effect at common law to pass her estate, whether executed jointly with her husband or otherwise. It could only have been done formerly in England by fine, and can only be done here by a deed made in conformity to our statute which regulates alienation by married women. All that is said in the text of Littleton from page 162 to 172, must be read with the recollection that it applies only in the case of parceners, and that he wrote before the stat. 31 Hen. VIII. ch. 1, was passed. His sections 200 and 318 relate to the cases of joint tenants and tenants in common, and with regard to both he lays it down, that they

are not compelled, that is by the common law to make partition by law, but if they will make it of their own will and agreement, such partition shall stand in force.

Hence the principle applies, that at common law a married woman is incapable of exercising a will for this purpose, and that her husband cannot at his will bind her estate of inheritance. Littleton, sec. 256, lays it down, "that if two parceners in fee take husband, and they and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shall stand during the lives of their husbands, yet after the death of the husband that woman which hath the lesser part may enter into her sister's part and shall defeat the partition."

In commenting on this section, Lord Coke says, "whereby it appear-"eth, that if the parts at the time of the partition be of equal value, "neither the wives nor the heirs shall ever avoid the same, and the "reason thereof is, for that the husbands and wives were compellable "by law to make partition, and that which they are compellable to do "in this case by law, they may do by agreement, without process of "law."

This is said only of wives who are parceners, that is, who come to their estate by descent, not of tenants in common. The former having, it is said, a threefold privity, viz., in estate, in person and in possession, and the latter only a privity in possession, and not in person or estate. When, therefore, the tenant in common in the case before us conveyed her interest to her co-tenant, she conveyed an estate wholly her own; that is, her moiety. And when Lord Coke says, "for that the husbands and wives were compellable by law to make partition," he means by the common law, which applies to parceners only.

In Ireland v. Rittle et al., I Atk. 541, the husbands of two co heiresses, by agreement between themselves, made partition; and Lord Harwicke says of it, "that being only an agreement between the husbands, it could by no means bind the inheritance of the wives." Upon which the learned editor of Atkin's Reports remarks in a note, that this doctrine, so far as it relates to partitions (when such partitions are equal), is directly contrary to the text of Littleton, sec. 257, and the authority of his commentator. But this seems not to be correct, for Lord Coke, in his commentary on sec. 256, remarks, that the wife must be a party to the partition, and so indeed that section which I have already cited expressly requires; and with respect to section 257, although it stands thus: "but if partition "made between the husbands were thus,—that each part at the time of "the allotment made was of equal yearly value, then it cannot afterwards "be defeated in such cases," yet Lord Coke remarks on this section, that the text is mistaken, for that the original was not "parenterless barons," but parenter eux; that is, between the barons and femmes; and this error; he says, should be reformed.

Mr. Hargrave, in his note 29 to page 171 of Co. Litt., questions the

doctrine of Lord Hardwicke in Ireland v. Rittle, for he says, he takes the doctrine of Littleton and Coke to be, that a partition between the husbands alone will bind the wives unless it be unequal; and that, he adds, they take to be clear law, for the reason given in Co. Litt., that they are compellable by law to make partitions. But it is certain, that not only the text of Littleton, but the commentary of Lord Coke, in the very passage (page 171) to which Mr. Hargrave refers, applies to a partition by the husbands and wives, and not by the husbands alone.

If, however, this were otherwise, still the whole is said with reference to the husbands of wives who are parceners; and it would be no authority for holding that the husbands of tenants in common could alone make partition that could bind the wife, whether such partition were equal or unequal. But the law seeming to require, as it is laid down both by Littleton and Coke, that the wives must be joined, even when they are parceners, the necessity for their joining in the partition when they are tenants in common is so much the more indisputable.

In Co. Litt. 169 a., it is said by Lord Coke, that as among parceners, "not only lands and other things that may pass by livery without deed, but things also that lie in grant, as rents, commons, adowsons, &c., that cannot pass by grant without deed, whether they be in one county or in several, may be parted and divided without deed. But a partition between joint tenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statute "31 Henry VIII., ch. 1, and 32 Henry VIII., ch. 32, because they must pursue that act by writ de partitione facienda, and a partition between joint tenants without writ remains at the common law, which could not be done by parol. And so it is, and for the same reason, of tenants in common." But he adds, "if two tenants in common be and they make partition by parol, and execute the same in severalty by livery, this is "good and sufficient in law."

But now I apprehend, in the case of tenants in common, a deed would be required, (Willes, 248; 7 Mod. 345.) and at any rate in the case before us, it is only the deed, such as it is, that the defendant had to rely upon for his title. 'That deed, I am of opinion, cannot be by the husband alone in any case, and certainly not the husband of a tenant in common, but the wife must join, and the assurance derives no additional validity from the wife joining in the deed, unless the conditions of the statute are complied with, which are necessary for giving to her deed any effect for binding her estate.

In Co. Litt. 187 a., the dictum is repeated, that though tenants in common are now compellable to make partition, yet they must pursue the statutes, and can no more make partition by parol than before, for that remains (that is where no writ is sued out) as at the common law; and Morrice's case, 6 Co. 12, is to the same effect.

I take indeed the law in this case to be perfectly plain, although in several books there are passages which are apt to be misapprehended, from the circumstance of principles being laid down in general terms.

as if they were applicable to partition in all cases, when they are intended to be understood only of partition among parceners. I think what is said in Com. Dig., Parcener, C., 11, and F. N. B. 62 F., affords instances of this. The modern Treatise of Mr. Allnutt on the subject of partition draws attention to this. I refer to page 21 et seq., and to his 5th chapter.

The effect of our opinion is, that Mr. Arnold and his wife on the facts stated are not and have not been legally seized of the whole estate in the lot in Vaughan, by reason of the estate of Mr. Langstaffe not having passed by the deed of partition for want of a judge's certificate; and we take it, that the understanding of the parties is, that in consequence of this being our opinion, judgment is to be entered for the plaintiff by default, without regard to the precise language of the plea.

.Per Cur.—Judgment to be entered for the plaintiff.

EWART V. WELLER.

To an action upon a note, by an indorsee against the maker, who signed the note in his private capacity, a plea setting up a defence of want of consideration for the making of the note, as regarded the defendant, together with notice and want of consideration on the part of the indorser, and also setting up the further defence, that the defendant made the note as President of a Company, to be binding only upon the company, and on the understanding with the payee, that there was to be no recourse upon the defendant—is bad for duplicity.

Held, also, Per Cur.—That the plea is also bad as an argumentative denial of the making of the note—and as setting up a verbal undertaking, contrary to what the maker's signature to the note would import.

Declaration: Indorsee v. Maker, in his private capacity, on a note for \pounds coo.

Plea: That when the said promissory note was drawn and made as in the said first count mentioned, he, the defendant, was and still is the President of the Cobourg and Rice Lake Plank Road; and Ferry Company; that the said Company was then indebted to the said John McCarty, who endorsed to plaintiff, in the sum of money mentioned in the said note. And that the said note was made, drawn and signed by the defendant as such President, and in that character, and no other, by and with the consent of the said company, and at the request of the said John McCarty, for the purpose of charging the said company. And the defendant further said, that at the time of making and signing the said noté, it was agreed by and between the defendant, and the said John McCarty, that the defendant should not be made personally liable upon the said note, and that no claim or demand should at any time be made against the said defendant in his private capacity upon or in respect of the same. And the defendant further says, that in violation of good faith, and contrary to the said special purpose for which he so received the said note, he, the said John McCarty, fraudulently and without the authority of the defendant, and with intent to defraud the defendant, endorsed the said note to the plaintiff as in the said first count mentioned.

And the defendant further says, that the plaintiff, at the time when the said note was so endorsed and delivered to him by the said John McCarty, had notice of the premises, and well knew that the said John McCarty had no power or authority to negotiate the same, so as to charge the defendant personally therewith. And there was not at any time any consideration whatever, for the payment of the said note by the defendant. And that there was not, at any time, any consideration or value given in good faith for the said endorsement of the said note to the plaintiff as in the defendant, and that the defendant is ready to verify, &c.

Demurrer to plea: That it does not appear by the said plea that the Cobourg and Rice Lake Plank-Road and Ferry Company, therein mentioned, is an incorporated company or corporated body capable of being or of contracting in a corporate capacity, and that, consequently, for anything that appears in the said plea, the said defendant may be liable on the said note as one of the members of the said company.

And that it is contradictory and inconsistent to allege that the said promissory note was drawn and signed by the defendant for the purpose of charging the said Company, and also to allege that it was agreed that the defendant should not be liable for the amount of such note in his private capacity.

And also for that it does not appear that the said company, even, although capable of binding itself in a corporate capacity, is in any way liable upon the said promissory note.

And that the defendant has no remedy whatever in the said note unless the defendant is personally liable thereon. And also for that by the said plea, the defendant attempts to contradict a within instrument by matter not in writing, and to set up a verbal agreement in opposition to a written one made contemporaneously therewith; that by the said plea it is alleged as a violation of good faith and of the special purpose for which the said John McCarty received the said note.

And that he frequently and without the authority of the defendant, and with intent to defraud the defendant, endorsed the said note to the plaintiff, whereas, it is not alleged in the said plea that the said McCarty ever agreed not to endorse over or transfer the said note. Nor is an agreement stated which is inconsistent with such endorsement to the plaintiff.

And also that it is alleged that the said plaintiff, at the time the said note was indorsed and delivered to him, had notice of the premises in the said plea set forth, and well knew that the said John McCarty had no power or authority to negotiate the said note so as to charge the defendant personally therewith. And that there was not at any time any consideration whatever for the payment of the said note by the defendant; whereas it does not appear, nor is it alleged in any part of the said plea, that the said John McCarty had not power to negotiate the said note; and it is distinctly shewn by the said plea, that there was a consideration for the payment of the said note by the defendant—that the said plea amounts to an argumentative denial of the making of the said note by the defendant.

That the said plea is double in this, that it alleges that the said plaintiff had notice of the facts set out in the said plea, and notice that the said John McCarty had no power or authority to negotiate the said note so as to charge the defendant personally therewith, while at the same time it

alleges that there was not at any time any consideration or value given for the said endorsement of the said note to the plaintiff.

And that the said plea is double, in this, that it alleges that the said promissory note was made, drawn and signed by the defendant as President of the Cobourg and Rice Lake Plank-Road and Ferry Company, and in that character and no other. And it also alleges an agreement between the said McCarty and the defendant, of which it alleges the said plaintiff had notice, that the defendant should not be made personally liable on the said note, and that no claim or demand should at any time be made against him.

And also that it is uncertain whether the defendant in his said plea relies upon the fact of his having signed the said note as such President, or upon the said agreement, and notice thereof by the plaintiff, as his answer to the first count of the declaration.

And also that the facts stated in the said plea afford no ground of defence to the defendant, and furnish no answer to the said first count.

And that it is not clear from the said plea, whether the defendant intends to confess and avoid or to deny the making of the said note by him.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff, in our opinion, is entitled to judgment on this demurrer. Independently of other more substantial objections, the plea is certainly double, alleging a want of consideration for the making of the note as regards the defendant, which would be in itself a defence against the indorsee taking it without consideration, and with notice; and setting up a further defence that the defendant made the note, as President, to be binding only upon the company, and on the understanding with the payee, that there was to be no recourse upon him.

The plea is also bad, as being either an argumentative denial of the making of the note by the defendant, or as seeking to destroy the legal effect of his promise, admitting it to be *prima facie* binding on him individually, by setting up a verbal undertaking, contrary to what his signature to the note would import. Such verbal understanding is inadmissible, otherwise there would be no safety in taking the notes or bonds of parties.*

The case of Leadbitter v. Farrow, 5 M. & Sel. 345, is in point to shew that upon the statement contained in the first count on the note, the defendant is clearly liable on the note, which, as the facts are there given, would not bind the company, admitting them to be in law capable of making a promissory note,

Per Cur.—Judgment for the plaintiff on demurrer.

^{*} Dow. 74; Selwyn's N. P. 394, (a); 3 Campb. 57; 8 Taunt, 92; 10 B & C., 731.

WILLIAMS V. HERRICK.

Pleadings—As to the mode of setting out an alleged demise from the Toronto Club, of certain rooms and apartments in the club house, to a servant or steward of the Club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass. Semble, that under the demise as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed, he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments.

The declaration stated that the defendant on the 31st October, 1848, vi et armis assaulted the plaintiff, &c.

and count: that the defendant on the 31st October, 1848, vi et armis broke and entered certain apartments and rooms of the plaintiff, being part of a certain dwelling house (therein described), and also then ejected, expelled, and put out and amoved, the plaintiff and his family from the possession, use, occupation, and enjoyment thereof, &c.

4th plea to 2nd count: that James Chewett, before the said time, when, &c., viz., on the 1st January, 1848, was seised in fee of and in the said apartments and rooms in the said dwelling-house, and being so seised afterward and before the said time, &c., viz., on the day and year last aforesaid, demised the said apartments and rooms to the defendant to hold from thenceforth for one year, by virtue of which the defendant entered and became possessed thereof, &c., and being so possessed, the plaintiff claiming title, &c., (giving express color and entry of the defendant under a pretended charter of demise from the said J. C., &c.) and thereupon the defendant entered into and upon the said apartments and rooms, in which, &c., in and upon the plaintiff's possession thereof as being the apartments and rooms of the defendant, and committed the said trespasses in the said second count mentioned, &c., as he lawfully might do, &c., quœ sunt eadem, &c.

Replication: that before the said time when, &c., and after the making of the said demise by the said J. C. to the defendant, and before the expiration thereof, viz., on the 11th of April, 1848, the defendant was one of divers persons, to wit, Thornton Todd and others, to the plaintiff unknown, who comprised an association called by the name of the Toronto Club, which club, including the defendant, was, viz., on the day and year last aforesaid, under and by virtue of the same demise by the said J. C. as aforesaid, in possession of the said apartments and rooms, and being possessed before the expiration of the said demise, and before the said time when, &c., viz., on the day and year last aforesaid, demised the said apartments and rooms to the plaintiff, for the consideration and upon the terms and for the time following (i.e., that the said club was to furnish certain rooms, viz., the anteroom, dining room, and reading room, contained in the said dwelling house (not being then demised to the plaintiff as above alleged); and the plaintiff was to furnish the remainder of certain other rooms, viz., a smoking room and six bed rooms, contained in the dwelling house aforesaid (not being then demised to the plaintiff as aforesaid); that the

plaintiff was to provide firing and lights for the club rooms (not being them demised to the plaintiff as aforesaid) free of charges, and was to furnish dinners, wines, beds, and other usual supplies, at the rates and prices to be stated therefore by the said club; that the plaintiff was to make no extra charge against the club for lights after twelve o'clock P.M., that the club was to pay the plaintiff at the rate of 50l. for each year of the plaintiff's services, and materials supplied according to the terms of the said demise. as herein recited; that the plaintiff was to provide a waiter for the sole use of the said club, and a messenger when required; that the club might dispense with the plaintiff's services on giving him three months' notice, and that the plaintiff might discharge himself on like notice; and it was in and by and at the time of making of the said demise, distinctly understood and agreed upon by and between the plaintiff of the one part, and the said club, including the defendant, of the other part, that upon the plaintiff receiving or giving a six months' notice, he was to abandon possession of that portion of the said dwelling-house, i.e., the apartments and rooms in the said second count and fourth plea mentioned, which the plaintiff was by the said demise permitted to occupy; and the plaintiff was also to quit the service of the said club at the expiration of the said six months, under the said notice; and that the plaintiff was to provide the said club with table linen, &c., subject to the approval of a certain number of persons in the said club, called a committee; and that afterwards, viz., on the day of the making the same demise, and before the said time when, &c., he under and by virtue of the said demise, and with the permission of the said club, including the defendant, entered into the possession and occupation of the said demised premises, i.e., the said apartments and rooms in the said second count and fourth plea mentioned, and became and was thereof possessed under such demise and permission, and continued so possessed thereof until the defendant afterwards and during the continuance of the said demise, viz., at the said time when, &c., in the said count mentioned, of his wrong, broke and entered the said apartments and rooms in the second count mentioned, and so demised to the plaintiff as above set forth, and committed the said trespasses in the said fourth plea and second count mentioned, and so demised to the plaintiff as above set forth, in manner and form as the plaintiff hath above thereof complained, &c., verification.

Demurrer, on the grounds, 1st, that no demise to the plaintiff for any certain time was therein stated, nor any exclusive right of occupation, but only a permissive right of occupation.

andly, that it was not stated that the said demise or agreement was in writing.

3rdly: nor was it shewn that the said club was in possession of the said apartments and rooms, under the demise of the said J. C.

4thly, nor was it expressly averred that the defendant demised, &c., stating thereby only argumentatively, that the defendant demised to the plaintiff.

5thly: that it was stated that the said club demised, whereas it ought to have been that the said persons, styled the Toronto club, demised.

6thly: and also that the said agreement was only for the services of the plaintiff, and that it was inconsistent in one part thereof, requiring only three months' notice to the plaintiff to determine the said agreement, and in another six months, &c.

It was contended by Cam'ron, Q. C., in support of the demurrer that the replication did not sufficiently shew a demise to the plaintiff, only a permissive occupation as servant of the club.

That no rent was stated to have been reserved or payable, but that the plaintiff was to be paid by the club for his services.

That the use of the rooms in question were not alleged to have formed part of, or to have been mentioned in the said agreement stated.

That no exclusive right of possession was shewn in the plaintiff.

That the defendant pleaded a demise, to which the plaintiff replied an argumentative denial, viz., that the club were possessed under such demise-

For the plaintiff it was contended by Wilson, that it was not necessary to allege a demise in writing.—5 A. & E. 856.

That all the interests of the parties were reconcileable, without conflict. That the plaintiff holding under the defendant, and the rest of the club, need not further to have shown their right. That a demise by the club, including the defendant, was equivalent to a demise by the defendant. That the replication shewed authority from the defendant. That the replication in mentioning the club, referred to the persons composing it, as previously stated. That if there was any inconsistency in the periods of three and six months respectively, it was the fault of the agreement, which was so, but that the three months related to services, and the six months to the possession of the rooms, &c., in question.

That (which is the main point) the plaintiff was possessed under a demise, and that leave was shewn under the replication.—5 A. & E. 856.

That such demise was shewn to have been completed by entry.—I Tyr. 295; Bac. Ab. Lease, M.

That the special terms were maintainable, though not a demise or agreement in writing.—5 A. & E. 856; 5 Tyr. 471; 1 A. & E. 52.

That permission to occupy, constituted a valid lease.—4 Burr: 2208; see S. C. 167; 4 M. & W. 687; 4 Taunt. 128; 3 M. & Scott. 790; 5 M. & G. 54---it being sufficient to shew that one party was divested, and the other admitted into the possession. That a rent reserved was not necessary to its being a lease.—Com. Dig. Estates, G. I, and notes; 4 Ea. 29. That services formed a good rent.—I Saund. 265; 7 A. &. E. N. S. 976; Co. Litt. 142, a. & 76. That title was sufficiently shewn, 2 Vent. 249, 270.

That the plaintiff was estopped from disputing the right of the club to demise, and so was the defendant, and that the relation of landlord and

tenant, and not of master and servant, was created and subsisted.—5 M. & Scott, 790; 5 M. & G. 54.

That if only a lease at will, defendant should have pleaded that by way of rejoinder, and shewn a determination of his will before the time when, &c.

That the six months' notice to quit, created a term, determinable only on such notice, and an interest similar to a term for years, and a party may have a term in rooms and apartments.—Bac. Abr. Leases, M. 3; 2 U. C. R. 78; 3 U. C. R. 510; I Taunt. 555.

That even if only a tenancy at will, the facts amounted to no defence, the defendant not being at liberty to eject the plaintiff, vi et armis.—I M. & G. 644; I4 M. & W. 437; 9 M. & W. 643.

To which it was replied by *Cameron*, that the expulsion was only aggravation, and if the *entry* was lawful the trespass was answered.

That several of the cases alluded to by the plaintiff's counsel, arose on the evidence at nisi prius, and not on the pleadings.

That a mere entry determined the will on the face of it, and did not require to be otherwise pleaded.

That the demise stated by the plaintiff was inconsistent with that relied on by the defendant—if any demise to the plaintiff was stated, which is denied, and that a permissive and not an exclusive occupation.

That it was an agreement required to be in writing, and should have been so stated in the replication; also that the names of the club should have been set forth.

In short, that the replication at best shewed only a mere license revocable at pleasure, the plaintiff being merely the steward or servant of the club, occupying, as such, apartments provided by them for the use of their servant or steward.—I Stra. 651; I Tyr. 295; I B. & C. 531-5; I B. & A. 473; I6 East. 33; 2 Taunt. 339; 2 Q. B. 580; IO B. & C. 718; 7 C. & P. 568; I C. & K. 198; Stephen Pl. 228, 347, 428-30; 2 Taunt. 278; 3 N. & M. 671; 7 M. & W. 86.

MACAULAY, J., delivered the judgment of the court.

If this case was to depend upon a decision of this demurrer, I should prefer postponing the judgment till next term; but it appears to me, the replication is bad in form. It may be important therefore to the plaintiff to know the opinion of the court without delay.

The replication is bad on the 3rd, 4th and 5th grounds of demurrer.

It does not assert that the defendant demised or assigned to the members of the club, or any of them, or how therefore they were possessed under the demise from Chewett to the defendant. Then, without shewing any right in the club to demise, the plaintiff sets up title under a demise from them, speaking of the club as including the defendant, but leaving it uncertain whether the defendant was any party to such demise to the plaintiff or not. If the defendant is a party thereto, then (in the absence of any title shewn in the club, or the members of the club) it would in law operate as a demise of the defendant, and a confirmation of the other parties thereto, and should be pleaded according to its legal effect.

It is informal also, as setting up a demise from the club, as if a corporation, while the replication on the face of it shews it is not; and in the matter of it, it is an argumentative statement that the defendant demised to the plaintiff—a fact, which if so, ought to have been averred in direct terms.

If desired, the plaintiff may amend upon 'payment of costs; if not, judgment will be against the replication on these grounds.

As to the main ground of objection, the question whether the defendant was justified in entering the rooms in question and ousting the plaintiffs may perhaps be more satisfactorily raised on the evidence at the trial; but if to be determined on the facts set forth in the replication, there is, I think, much to shew that the substance of the agreement was a hiring of the plaintiff as a steward or servant of the club, and that the permissive occupation of the rooms and apartments mentioned in the declaration and pleading, was not as under a demise thereof, but merely as an incident to the situation of such steward or servant, the privileges of occupation depending upon the continuance of the service, and ceasing therewith.

If so, it would follow, that although neither party could, without adequate cause, terminate the service and put an end to such agreement, without three or six months' previous notice, still (admitting an implied engagement from three months to three months, or six months to six months) the club might justifiably, i. e. with sufficient cause, dismiss the plaintiff, without such warning, or might do so wrongfully; in which latter event the plaintiff's remedy would seem to be on the contract for the breach thereof, and! not in trespass for taking possession of his apartments in the club-house. Upon this point, however, no opinion is at present expressed.

Per Cur.—Judgment for defendant on demurrer.

SMITH ET AL. V. RIDOUT.

Held, per Cur.—That under the new Registry Act, 9. Vic. ch. 34, the Registrar must record the memorial for a deed, &c., in every township in which there are lands situated which are embraced in the deed. Also, that he need not enter in the book of any township, other lands than those lying in that township. And also, that his proper fees are 2s. 6d. for the first 100 words of the registration in each book, and 1s. for every 100 words over the first 100 in such registration.

Special case. Declaration in assumpsit for money had and received. Plea: Non-assumpsit.

The defendant has been for years Registrar of the county of York. The plaintiff, on or about the 25th day of January, 1849, presented for registration a deed, in which, and memorial of which, lands in three several townships of the county of York were comprised. The fees to be claimed by the Registrar, if the lands had all been in the township, would have been £3 1s. As the lands were in three townships, the defendant

claimed that under the last Registry Act, 9 Vic. ch. 34, he had to enter the memorial in the book of each township, viz., three times in as many books; and that his fees properly claimable under the act were £8 185. which the plaintiff paid under protest, and as the only means of getting the deed recorded—the defendant refusing to register, unless said last-mentioned fees were paid.

This action was brought to recover £5 17s., the difference between the amount paid and £3 1s., which would be the amount of fees if all the lands had been in one township.

The plaintiff contended that under the act in question, the Registrar's fees are wholly regulated by the 16th clause; and that the length of the instrument, and not the number of times it has to be entered in the Registrar's books, if more than one, was to govern the charge; and that the act gave no additional fees merely because the deed or memorial comprised lands in different townships.

It was admitted that if such charge as was made be improper, this action would lie, and the plaintiffs should recover.

The question for the consideration of the court was, whether on the case stated, the plaintiffs were entitled to recover from defendant the amount, as they contended, overpaid; or whether the defendant was legally authorized to make such charge as the sum paid, on account of lands being in different townships.

It was also agreed, that if the judgment of the court should be for the plaintiff, then judgment for the plaintiff should be entered as by confession; if in favour of the defendant, that then judgment as of nonsuit should be entered.

Hagarty for plaintiff. Burns for defendant.

ROBINSON, C. J., delivered the judgment of the court.

Our construction of the Registry Act in the points submitted to us is, that by directing a separate register-book to be kept for each township, city or town, the statute requires a distinct registration of the memorial in the proper book of each township in which the lands contained in the deed are situated; but that in recording the memorial in each book, those parcels of land should be omitted which are not within the township for which the book is kept—though the Registrar would perhaps do well, in order to prevent any improper inferences from the apparent disproportion between the consideration named in the deed, and the lands that would otherwise appear to have been alone conveyed to make a minute in the margin of the registry, that the memorial contains lands in other townships. This recommendation is not to be taken as a direction of the court, but a mere intimation of my own opinion of what it would be reasonable to do.

As regards the fees which the Registrar is entitled to in such cases, we are of opinion that he is entitled to charge by the same rate for each registration—that is to say, 2s. 6d. for the first hundred words, and 1s. for each hundred words above the first hundred; which computation is to be made upon the words contained in "the recording of every such

deed"; that is upon the contents of the entry in the Registrar's book, and not upon the words contained in the deed or conveyance itself. The legisl lature must have mean't this to be the effect of the 16th clause; and though they have not expressed their meaning well, yet we think the language of the whole clause will bear that construction.

Per Cur. - Judgment for the defendant.

BANK OF UPPER CANADA V. BLOOR ET AL.

Held, per Cur.—That a notice of non-payment of a note sent to an endorser, through the Post Office, addressed to him in "York Township," in which he resided, was sufficient, there being no evidence as to whether there were one or more Post Offices in that township, nor any proof that a letter for any other purpose would have been usually addressed in any other manner, or ought, in the common course of things, to have been directed to any certain Post Office in the township or any other township near him.

The question in this case was, whether a written notice of non-payment of a promissory note given to an endorser, was duly given, being directed to him thus:—" J. Carruthers, York Township"—and put in due time into the Post Office in the City of Toronto. The note was dated in Toronto—indorsed by Carruthers, the testator, in the common way; that is with no memorandum of his place of residence.

It was not proved at the trial whether there was more than one Post Office in the township of York, nor whether, there was any post office in it, nor what post office was next to the testator's place of residence, which was in the township of York.

The objection was taken at the trial, that the notice was insufficient for want of a more particular direction being given to the letter containing it, and when it was not shewn that a letter so directed was likely to reach the indorser. The objection was over-ruled.

Bell moved for a new trial on the law and evidence; and for misdirection. Gamble shewed cause.

The following authorities were cited: 3 M. & W., 166; 7 M. & W. 515; Story Pro. Notes, sec. 346; Ry. & M. 149; 3 Esp. C. 54.

Robinson, C. J., delivered the judgment of the court.

We think, under these circumstances, we should not set aside the verdict.

There being no evidence given by the defendant to show that any better

There being no evidence given by the defendant to show that any better direction might have been given to the letter, we cannot take judicial knowledge that the letter could have been directed to some place where the indorser would more likely have received it. It would embarrass commercial transactions intolerably, if we were to hold that the sending of a special messenger was necessary, on the mere assumption that the indorser could not be found for this purpose, as well as for others, through the post office; and it was not proved that letters mailed in Toronto for persons inhabiting the township of York would in any case be otherwise directed.

The question is one on which many decisions have taken place in England, some favouring the objection, others admitting, as I think, of a latitude as great as has been taken here. But we do not think it necessary to go into an examination of authorities, for it is our opinion that the holder of a bill may be considered as having used due diligence, when he mails his notice in due time, addressed to the endorser in the town or township in which he actually resides, so long at least as it has not been shewn that a more particular direction would, in other cases, be ordinarily used in a letter sent to the same party through the post; and was therefore proper to have heen used in this particular case.

I apprehend, from cases which have been before me on the circuits, that the holders of notes in this province are not in general aware of the degree of care proper to be used in giving notices. They seem attentive only to the time of giving notice, and not to the manner of it; though it is very certain that by want of proper care, in the latter respect, great risque of loss may sometimes be incurred.

Per Cur.-Rule discharged.

SHERIFF V. PATTERSON ET AL.

School trustees acting under the statute 9 Vic. ch. 20, cannot be sued as individuals upon any contract made by them under the statute as trustees.

In this case the only question of importance was, whether the plaintiff, a schoolmaster employed by the defendants, acting as school trustees under the statute 9 Vic. ch. 20, could sue the defendants as individuals in their natural capacity, for his school dues.

Dempsey for the demurrer. Wilson contra.

The following authorities were cited, 6 A. & E. 820; 6 M. & W. 822; Harr. Dig. Corp. 664; 2 Saund. 5 (f.); 1 Ch. Pl. 428, 552; 2 Dowl. N. S. 418; 5 M. & W. 468; 4 A. & E. 262; 2 Ch. Rep. 291; 1 Saund. 28, note 3; 6 M. & W. 815; 8 M. & W. 614; 6 A. & E. 646; 5 A. & E. 526.

ROBINSON, C. J., delivered the judgment of the court.

This case is not distinguishable from that of Anderson v. Vansittart, U. C. R., lately before us in this court.

We are bound judicially to notice that these defendants, as school trustees, are incorporated and are liable to be sued in a corporate capacity only, and not as individuals upon any contract made by them under the statute as trustees; and this in the face of the declaration is such a contract.

How the plaintiff is to obtain satisfaction of any damages which he might recover against the trustees as a corporation, need not be now considered, since it cannot affect the question; for whatever may be the certainty of his finding a fund on which he can have recourse, and whatever his means of seeking redress, it is plain he cannot sue the defendants in their natural capacity for acts done by them as trustees, and for which they are made liable by the statute to be sued in their

corporate capacity.—I B. & P. 158; 2 Taunt. 374; 6 T. R. 396; Gows. N. P. C. 117.

Per Cur.-Judgment for the defendants on demurrer.

Brown v. Shaver.

A. makes a promissory note payable to his own order; B. sues him as indorsee, claiming by indorsement of A. made subsequent to the note; *Held, per Cur.*, that the declaration in that form was bad on special demurrer.

Appeal from the district court of the District of Victoria.

In this case the only question that came up on demurrer before the court below was, whether an instrument drawn payable to the maker's own order and endorsed by him subsequent to the making of the note, was a promissory note upon which the indorsee could sue the maker, claiming by indorsement from him.

The judge of the district court held that it was, and this judgment was appealed from.

Fitzgerald for the appeal. Hagarty contra.

The following authorities were cited: 16 L. Jl. Exch. 23; Q. B. 446; 12 Jurist 270; 12 Jurist, 680; 16 M. & W. 51; 11 Jurist, 1016, 967.

ROBINSON, C. J., delivered the judgment of the court.

A note payable to the order of A. B., is the same as if payable to A. B. or his order, and it is on that principle that if not indorsed, it may be sued on by A. B. as if payable to himself.

But a promissory note made by a person payable to his own order, or in other words payable to himself or order, is not a promissory note within the statute of Anne. The promise to pay himself a sum of money is, of course, no legal contract. It is nothing that can be assigned to another.

If Shaver, who is sued as maker in this case, had made a note promising to pay "to the person whose name is written on the back hereof" so much money, that might perhaps have been treated as a good promissory note, payable to the person whose name had been so indorsed. declared upon as a note complete before indorsement, and afterwards indorsed by the payee, who is no other than the maker himself; in other words, it is an action maintainable only under the Statute of Anne, as by the indorsee of a promissory note indorsed to him, which note therefore requires to be a valid note under the statute. The mistake of making notes in this form, I suppose, arises from confounding notes with bills of exchange, and the drawer of the one with the maker of the other; not considering that in the bill of exchange, it is the acceptor who makes the contract, and there is no repugnancy, therefore, in the drawer making the bill payable to himself; but it is absurd that a man should make a note payable to himself, and when he has done so, he has no legal contract that he can transfer—there is no payee. He can assign a note made by another under the statute, but not a note made by himself.

Whatever ingenuity may be exerted in supporting an action upon such

an instrument after verdict, if brought in some other form, the last case bearing on this point in England, Browns v. DeWinton, 12 Jurist, 680 shews clearly enough, I think, that this declaration cannot be held to be good on special demurrer.

Per Cur.-Judgment for the defendant on demurrer.

BILLINGS V. NICOELS.

Held, per Cur., that under the District Court Act, 8 Vic., ch. r3, sec. 5, the district courts have jurisdiction in actions on covenants, to pay a sum certain, to 50l., as in other cases of contract where the amount is ascertained by the signature of the party.

Appeal from the Home District Court.

Declaration: common form of action of covenant or mortgage, for non-payment of principal and interest, amounting to 30l. Damages laid at 40l.

Demurrer: 1st, because the declaration did not aver the cause of action to be within the jurisdiction of the district court. 2ndly, because the declaration shewed a cause of action. beyond the jurisdiction of the district court, claiming 30% 3rdly, because the declaration claimed damages to 40l, which was beyond the jurisdiction of the district court.

.*The judge of the district court decided in favour of the demurrer upon the 2nd ground. The judgment was appealed from.

Eccles for the appeal. Duggan contra.

The case relied upon was I Dowl. N. S. 168;

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion, that the proper construction of the 5th cl. of 8th Vic. ch. 13, is that in any case of covenant (excepting of course any question of title to real estate) the district courts have jurisdiction to the extent of 25l., although the damages may be wholly unliquidated, and a question for the jury; as for instance, a covenant to repair or to indemnify, and that in case of contract, including contracts by covenant, which are the plainest description of contracts, or in debt on the common counts, where the amount is ascertained by the signature of the party, the district courts have jurisdiction to the amount of 50l.

We think covenants are not the less included in "contracts" of this description, because the word "covenants" had been used before in a more general sense; but that the latter part of the clause applying to contracts to pay specified sums of money takes in contracts under seal, (in other words, covenants) as well as those not under seal.

As to any other question that can arise upon the jurisdiction in this case, we consider that the plaintiff cannot be looked upon here as claiming both the 25*l*., and the 40*l*.; but he limits his claim under the covenant to 40*l*., which will enable him to recover the liquidated sum of 25*l*. and interest. On this point we refer to the cases decided in this court, of Gardiner v. Stoddart and Jordan v. Marr.

The judgment below therefore is reversed, and judgment given for the plaintiff on demutter.

Per Cur.-Judgment below reversed.

DODDS V. DURAND.

"Received of —, six boxes of axes, to be sold for him on commission, and "when sold, I agree to account to him for those sold, at the rate of, &c., and "return the remainder unsold on demand."—Held per Cur., that an action for goods sold and delivered, would not lie for any of the axes not returned.

Assumpsit on the common counts for goods sold and delivered, and on the account stated.

Pleas—Non assumpsit count for goods sold and delivered, and non assumpsit to the account stated, except as to 101. which the defendant paid into court.

The plaintiff replied damages beyond 101.

Plaintiff produced, and proved on the trial, a receipt, signed by the defendant in these words—"Dundas, 23rd January, 1843. Received of "Mr. J. Armstrong, six boxes of axes, to be sold for him on commission, and when sold, I agree to account to him for those sold, at the "rate of 16 dollars per dozen, and return the remainder unsold on de-"mand, he warranting the same for 30 days."

Armstrong was called as a witness on the trial, and swore that he was then acting as agent for the plaintiff; that the defendant may have supposed, as the receipt imports, that the axes were to be accounted for to witness; that the witness never authorised any one to receive back from the defendant any portion of the axes, so far as he could remember; that the defendant had returned him half a dozen axes lately, as being unsold, and offered to pay the balance due for those sold, but claimed credit for three of the boxes, which he said had been re-delivered on the 16th November, 1843, on an order from the witness, Armstrong, as he found by an entry in his books, made by a clerk who is now dead.

The entry in the book was produced and proved, of a delivery of three boxes of axes on Armstrong's order, but the jury gave a verdict for the price of the three boxes, 12/.

The objection taken by the defendant was, that there was no evidence to support a demand under either count of the declaration; no goods sold or delivered, nor any account stated.

The learned judge thought the objection entitled to prevail, but allowed the case to go to the jury, and reserved leave to defendant to move.

Jones obtained a rule for non-suit, on the leave reserved at the trial. Crooks shewed cause.

The following authorities were cited:—2 Bing. 4; I M. & W. 545; 6 A. & E. 829; 8 Scott, N. S. 839; I Dow. & Lownd. 367; 4 Jurist, 988; 2 B. & P. 243; 4 M. & Gr. 646.

ROBINSON, C. J., delivered the judgment of the court.

There was evidently no evidence to support a recovery, as on an ac-

count stated, and the only question is, whether under the circumstances the plaintiff could properly recover as for goods sold and delivered.

The case of Ley v. Frankenstein, 8 Stott, N. S. 839, is expressly against the plaintiff.

Here the objection was taken at Nisi Prius, and leave reserved to move for a non-suit upon it, which places it on a different footing from the case cited, of Harrison v. Allen et al., 2 Bing. 4. The contract between the parties in this case, is clearly different from that in Bianchi v. Nash, 1 M. & W. 545; and from that in Beverley v. Lincoln Gas Company, in both of which cases a sale was contemplated, whereas here the agreement was that the defendant should account for what he sold, and return the remainder on demand; and it was only for breach of that agreement that he was liable, and not to the price of the goods as a purchaser, when he had not bought them.

If the plaintiff should think it advisable to take a new trial, for condition of paying the costs of the last, and of this application, and with leave to amend on paying the costs occasioned by the amendment, we will give him leave to do so; otherwise, judgment of non-suit. But for my own part, I should question the prudence of such a course.

There would seem to be some mistake in the matter, for the entry in books by a deceased clerk of the return of three boxes on Armstrong's order, which entry was made not long after the lot of axes had been delivered to the defendant to sell, is a circumstance that throws great doubt on the plaintiff's claim.

Per Cur.-Rule discharged.

IN RE BALKWELL.

Held, per Cur., that under the statute 10 & 11 Vic. ch. 48, the corporation of the town of London are the sole judges of the return and qualifications of candidates for seats in the common council, and that their decision is final.

Balkwell on the 9th of January, 1849, was a candidate for office of common councilman, for St. David's ward, in the town of London, and was second on the list at the close of the poll, having a majority over Nash of two votes; nevertheless Nash had been held by the council to be duly elected, on account of Balkwell being deemed disqualified by not being resident within the town.

The council having heard Balkwell on his petition, determined against him and have admitted Nash.

Balkwell stated facts on affidavit to this court, to shew that the objection against him as being non-resident, was not well founded, and applied for leave to file an information quo warranto.

But Held, per Cur., that it was clear under the provisions of the act 10 & 11 Vic. ch. 48, that the jurisdiction over the matter was in the council, to be adjudged by them finally, and that this court had no authority to overrule their decision.

Per Cur.-Information refused.

IN THE PRACTICE COURT. Before the Hon. Mr. Justice McLean. TRINITY TERM, 12 VIC.

HODSON ET AL. V. STEVENS.

The refusal of a judge at Nisi Prius to try a cause upon an immateral issue, places the record in the same position as if it had been made a remanet; the defendant, therefore, cannot have judgment in such circumstances, as in case of a non-suit.

Motion for judgment as in case of a non-suit, for not proceeding to trial agreeable to the practice of the court. The defendant's attorney made affidavit that issue was joined in this cause on the 1st day of October, 1847; and notice of trial served on that day, for the then fall assizes, in the district of Victoria, to be held on the 11th October. That the plaintiff did not proceed to trial at that assize, pursuant to notice. That two assizes have since been held in the district of Victoria, but that the plaintiff did not give notice of trial for the last assizes held in May last, or take any other or further proceedings in the suit, and that two terms have passed since issue was joined in the cause.

On the part of the plaintiffs an affidavit was made by their attorney, that the cause was entered and brought down to trial at the fall assizes, held in Belleville in 1847; that the plaintiffs were ready for trial, and that a jury was called, but that Mr. Justice Macaulay refused to try the cause on the ground that the replication to the defendant's first plea, was no answer thereto, and there was consequently no issue on that plea which could be tried. That an application was subsequently made for judgment as in case of a non-suit, for not proceeding to trial agreeable to notice, and that on a statement of facts the rule nisi obtained on that occasion was discharged. That subsequently an application was made for the costs of the day, and a rule obtained for their payment on the usual terms.

McLean, J.—The facts as stated in the affidavits of the plaintiff's attorney, are not denied, and that the cause was brought down to trial, and the plaintiff's ready to proceed with it. The refusal of the judge to try the cause on the ground that there was no issue to try, ought not to subject the plaintiff to costs for not proceeding to trial, when in fact they did proceed and were willing to go on as the record then stood. If the parties were in fact at issue as is contended by the defendant's attorney then the plaintiffs brought their cause down properly to trial, and the trial should have taken place; if they were not at issue, then no motion for judgment as in case of a non-suit could be entertained. The plaintiffs having brought their cause down to trial, and being ready to proceed.

cannot be non-suited on the ground of their being unwilling to prosecute their suit. The refusal of the judge to try the cause, places the record in the same position as if it had been made a remanet, in which case the plaintiff could not be non-suited. If the defendant conceive that issue is properly joined, he can bring the cause to trial by proviso, and thus have the matter disposed of if the plaintiffs do not choose to proceed, but after the suit has been brought down by the plaintiffs, and the record regularly entered for trial, this application for a non-suit for not proceeding to trial within two terms after issue joined, cannot be entertained, the rule nisi must therefore be discharged.

Per Cur.—Rule dicharged.

GORRIE V. BEARD ET AL.

A. and B. executor and executrix, having given a cognovit signed by them as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only in their representative character; Held per Cur., that though the cognovit might bind them personally in its terms—that a personal judgment entered up against them must be set aside. Semble also, that the judgment roll alleging "a debt due by the testator in his lifetime on an account stated" in consideration of which the defendants promised to pay, would not warrant a judgment against the defendants personally, but only against them as executor and executrix.

Motion by *Hagarty* to shew cause why the confession of judgment on which a judgment has been entered, should not be set aside with all subsequent proceedings had thereon, or why the judgment signed with all proceedings thereupon, should not be set aside, or why the writ of fieri facias, issued on the said judgment, should not be set aside on grounds disclosed in affidavits and papers filed, and in the meantime that all proceedings be stayed.

The confession of judgment was entitled in a cause of William M. Gorrie against Joshua G. Beard and Eusebia Elliott, executor and executrix of the last will and testament of Christopher Elliott, deceased, and it was signed by the defendants with the addition of executor and executrix to their respective names. In the body of the cognovit, however, the defendants say "we confess this action," and "we agree that judgment may be entered up forthwith in this action, and that in case we shall make default in the payment of the sum of 931. 12s. 2d., together with judgment thereon, and the costs and charges thereon, on or before the 14th July, 1848, the plaintiff shall be at liberty to sue out execution, and levy the said debt and interest together with costs, &c., and we hereby agree not to bring any writ of error, nor file any bill in equity nor to do anything whereby the plaintiff may be delayed in obtaining judgment or execution, and that we will well and truly pay the debt, interest, cost and charges aforesaid."

Upon the confession of judgment obtained in behalf of the plaintiff a judgment had been entered, the judgment roll alleging that Christopher Elliott, deceased, in his lifetime was indebted to the plaintiff in an ac-

count stated, and thereupon the defendant in consideration of the premises, promised to pay, &c.

In the affidavit of the defendant Beard, it was sworn, that a cognovit was presented to be signed by him and the executrix, in which they were not designated as executor and executrix, and by which they would be personally bound for the amount of the demand, and that he refused to sign such cognovit or any cognovit which should make the defendants liable in any other than in their representative capacity. That the plaintiff's attorney was aware of that fact, and that therefore the deponent considered he has been deceived and misled in reference to the cognovit he signed. He also swore, that he was not responsible for the debt in any other way than as executor. The other defendant swore, that she had not any idea that she was rendering herself personally responsible for the debt when she signed the cognovit, and that she was previously answerable for it only in her capacity of executrix.

Crooks shewed cause in the first instance, but filed no affidavits. He admitted that a previous cognovit had been prepared, as stated in Beard's affidavit, which the defendants refused to sign because they would thereby be personally liable; that the cognovit on which judgment was entered, was prepared in his office subsequently, and sent to the defendants who signed and returned it. He contended that the defendants were personally liable notwithstanding the entitling of the cause and their signature in the cognovit, and alleged that he would not have accepted any other cognovit from them.

McLean, J.—Why the plaintiff's attorney should decline to accept a cognovit from the defendants which would not make them personally liable, is not shewn nor is it easy to imagine, inasmuch as it clearly appears by the affidavits and papers filed, that the debt was one of their testator's for which they were liable only in their representative character. No ground is shewn upon which to charge the defendants personally with the plaintiff's debt; it is not contended that the assets of Christopher Elliott have been wasted, and that therefore the defendants choose to assume a personal responsibility. On the contrary, it is sworn and not denied, that they refused to assume such responsibility when the cognovit which was first drawn was presented for their signature, and it is quite evident that the cognovit which was signed was signed by them under the belief that the property of their testator and not their own property would be liable for the amount.

This cognovit is so drawn as to have led the defendants to that belief, and if so drawn, for the purpose of creating such belief, while the party who drew it was well aware that it would affect the defendants personally, the conclusion is inevitable that it has been obtained by a suppression of facts, and by means which are wholly unjustifiable, and which render it impossible for the court to allow it to stand.

If the confession is one which can only be good against the defendants in their individual character, then it must be set aside as having been obtained under such circumstances as give to it the character of fraud in a legal point of view.

If, on other hand, it is good as a confession against the defendants as executors, then the judgment may be amended, and the execution, so that they may run against the defendants in their representative capacity. There seems to me to be no doubt of the cognovit being good against the defendants as executor and executrix. It is entitled in a cause against them, and they sign it as such, and they cannot dispute its validity in the face of their own signatures. The judgment roll, so far as can be judged of its contents from the affidavits filed, seems to warrant a judgment against executors, for it alleges a debt due by Christopher Elliott in his lifetime, on an account stated, in consideration of which the defendants promised to pay, &c. Now there can be no foundation for such a promise by the defendants as individuals, it would be nudum pactum, being wholly without consideration; but a promise as executors to pay the debt of their testator. is one which is implied and recognized by law. The judgment appears to be defective and liable to be set aside on this account alone; but as the defendants do not desire to set the judgment wholly aside, and only ask for relief from a personal charge to which they have been improperly subjected; the rule must be made absolute for setting aside the execution, with leave to the plaintiff to amend the judgment so as to make the same a judgment against the defendants as executors and executrix of the late Christopher Elliott,

Per Cur.—Rule absolute, for setting aside execution against defendants personally.

LANGLE V. FETTERLEY.

If, after notice by the plaintiff's attorney to the defendant—a bona fide settlement—or if without notice, a collusive settlement—be made by a defendant with a plaintiff—this court, in the exercise of its equitable jurisdiction, will interfere to prevent the attorney from being unjustly deprived of his costs.

In this case a motion was made to issue on a f. fa. against the goods, &c., of defendant, upon the facts mentioned below, for the purpose of levying the amount of costs due to the plaintift's attorney. The plaintiff, through his attorney, the late Robert Cline, Esq., recovered a verdict for a sum within the jurisdiction of the district court, and a judgment was entered subsequent to the death of Mr. Cline, through Mr. Vankoughnet, as attorney for plaintiff, for the amount of the verdict, and district court costs. Before the issuing of execution, which was delayed some time by a motion for a new trial, the defendant called several times on Mr. William Robert Cline, a clerk, formerly in the office of Mr. Robert Cline, the plaintiff's attorney, who was attending to such matters as had been in Mr. Cline's hands, to ascertain the amount of the debt and costs in this cause, and was notified not to pay the amount to the plaintiff or to settle with him, but pay the same only to himself, as the agent of Mr. Cline's estate, and also of Mr. Vankoughnet, who acted by plaintiff's assent as his attorney after Mr. Cline's death.

When the defendant first called, the execution had not been received, and the information could not be given to the defendant which he required; he then requested Mr. W. R. Cline to write to him when he should receive the execution, and begged of him not to enforce payment immediately, but to be as indulgent to him as he could in the matter. After the execution was received, the defendant was written to, informing him of the amount; and notwithstanding the notice given to him not to pay or settle with the plaintiff, which notice Mr. Cline swears was given on several occasions both before and after the execution was received, the defendant settled with the plaintiff, not by paying money, but as he states in his affidavit, by giving him notes of hand, payable at some future period.

In the defendant's affidavit, he admits having called on Mr. William Robert Cline, to ascertain the amount of the debt and costs, and states that he was then informed, that not having heard from Toronto, he, Mr. W. R. Cline, could not inform him of the amount; that after the execution was issued, and without notice to the contrary from any person on behalf of the estate of the late Robert Cline, Esq., he the defendant, at the request of the plaintiff, settled the execution issued, by giving two promissory notes, payable to one Alexander Colquhoun, or bearer, to whom the plaintiff was indebted for 34l. IIs. 3d., which notes, about the 20th of February, were returned by Colquhoun, who stated that they did not suit him; when the defendant went to the plaintiff and gave him other notes in lieu of those given to Colquhoun, payable at the same periods and for the same amounts.

The defendant swore, that it was after the plaintiff's receipt was obtained on the 8th of February, that Mr. William Robert Cline for the first time said to him, "We will make you pay it over again."

The execution by the sheriff's indorsement appeared to have been received by him on the 22nd of January; and on the 8th of February, the defendant settled with the plaintiff, and took his receipt, under seal, in full of the judgment and execution, which he immediately took to the sheriff, with a view of getting a discharge from the sheriff of the execution. The deputy sheriff swore, that the receipt was brought to him on or about the 8th of February, but that he declined giving any discharge of the execution, having been previously informed by Mr. W. R. Cline, that he had notified the defendant not to settle with the plaintiff.

There was also an affidavit of W. R. Cline, Esq., that the defendant was notified in his presence by Mr. W. R. Cline not to pay the demand to the plaintiff.

McLean, J.—There is abundant proof in the affidavits filed, that the defendant received notice from Mr. W. R. Cline, who was acting by the authority of the plaintiff, and recognized by the defendant himself as the person entitled to give directions as to the levying upon the execution, not to pay over or settle the amount with the plaintiff; and the defendant himself swears, that the actual settlement with the plaintiff did not take place till the 20th of February—the arrangement made on the

8th, when the receipts were given, having proved abortive, in consequence of Colquhoun's declining to take the notes originally given; and that he had previously been told by Mr. W. R. Cline, that if he had settled with the plaintiff, "he would be made to pay the amount over again." defendant swears, that he made the first settlement with plaintiff without notice to the contrary from any person on behalf of the estate of the late Robert Cline. He does not in distinct terms deny what is positively stated in the other affidavits, that he was several times notified by Mr. W. R. Cline not to pay or settle with the plaintiff, and all that he may mean to convey may be, that Mr. W. R. Cline did not, when he gave him notice, expressly state that he did so on behalf of the estate. It may be perfectly true, as the defendant swears, that after the plaintiff's receipt was obtained, Mr. W. R. Cline for the first tims told him, "We will make you pay it over again," as it is not probable that such an observation would be made in giving him notice not to pay, or that it would be made till it was known that a settlement had actually taken place. The defendant, by the manner of stating, that for the first time he was told that he would be made to pay the amount over again, seem's to desire to have it understood that that was the first notice he received from Mr. W. R. Cline, as to the payment; but he seems carefully to have avoided throughout denying in express terms the notice which in the affidavits of Wm. Cline, Esq., and Mr. W. R. Cline, it is sworn he received.

It is, I think, quite clear from the affidavits, that the settlement with the plaintiff was made after notice to the defendant not to pay or settle, by a person authorized to give such notice. And if such notice had not been given, the settlement is shown I think satisfactorily to have been collusive, and intended to defeat the claim of the plaintiff's attorneys for their costs in conducting the cause. No money was paid to the plaintiff; and the taking of the promissory notes, payable at a distant day, in satisfaction of an execution which could have been immediately enforced, shews plainly what the inducement to such a settlement was.

In the cases, Welsh v. Hole, Douglas Rep. 238; Swain v. Senate, 2 N.

R. 99; Mitchell v. Oldfield, 4 T. R. 123; Reid v. Dupper, 6 T. R. 361—establish clearly, that if after notice a settlement is made by a defendant with a plaintiff, though made bona fide, or if a collusive settlement be made without notice, such settlement will not be allowed to take effect, but that the equitable jurisdiction of the court will be exercised, to prevent an attorney from being unjustly deprived of his costs.

In this case, the settlement made on the 20th February, was evidently

after notice, and it was collusive also, and on both grounds the plaintiff's attorney is entitled to relief. The rule will therefore be made absolute for the issuing of an alias execution against the goods and chattels of the defendant, to levy the amount of costs due to the plaintiff's attorneys in the cause, not exceeding the amount of the judgment.

BEFORE THE HONOURABLE MR. JUSTICE DRAPER.

MICHAELMAS TERM, 12 VIC.

McTierman v. McChesney.

The service of a copy of ca. re. will be set aside, unless a notice to appear thereon be written pursuant to the statute.

Quare! must this notice be endorsed on the copy of the writ? may it not be

written on a piece of paper attached to it?

Motion to set aside the service of copy of a ca. re., because there was no notice to appear thereon written, pursuant to the statute; the motion was made on an affidavit, that the copy of the process annexed, was the only one served on the defendant, and though there was a printed form on the back, it was apparently struck out, and was signed by no one, addressed to no one, mentioned no district in which appearance was to be entered, nor any return day. It was urged by way of reply, that the court had decided that a notice of the amount claimed, if instead of being written on the writ, was written on a piece of paper attached to it, would be sufficient, and that the same principle would apply here. When the plaintiff shews in reply to such an application as this, that a notice was so given, he might offer it as a sufficient answer.

DRAPER, J.—This is certainly no notice, and as there should be a notice to appear on the copy of the writ served, this service is irregular for want of it. There is nothing to shew here, that a notice to appear had been written on a piece of paper attached to the copy of the writ, and it is inconsistent with the affidavit of service made by the deputy sheriff, which is relied on by the plaintiff as shewing that on the copy was "endorsed a notice according to the statute." I do not think this affidavit can be considered as answering the defendant's application, and therefore make the rule absolute with costs.

Per Cur. - Rule absolute.

McMan v. Patterson et al.

An original ca. re. may, under the 8th Vic. ch. 36, issue out of the office of the deputy clerk of the crown of one district, directed to the sheriff of another district.

In this case the plaintiff issued an original ca. re. in trespass, out of the office of the deputy clerk of the crown, at Niagara, directed to the sheriff of the Gore District; and the defendants, or one of them, was served there, and now moved to set aside the process, or the copy and service, for irregularity, contending that only a testatum writ, and not an original, could be issued from the deputy clerk of the crown's office of one district, addressed to the sheriff of another.

DRAPER, J.—Though the title of the act would favour such a construction, (8 Vic. ch. 36, s. 1) the words of the first clause appear to me too strong to be got over, which after providing that the clerk of the crown shall supply his deputy with original and testatum writs of mesne and final process, excepting writs against lands and tenements, adds, "and that the same shall and may be issued by such deputies in any district in the same manner as may be done in the principal office at Toronto." This appears to me so exceedingly plain in its terms, as to leave no ground for sustaining the present application.

Per Cur.-Rule discharged.

LYSTER V. BOULTON, HAVING PRIVILEGE OF PARLIAMENT.

It is not necessary that the Commissioner should put his initials opposite interlineations in the affidavit itself, or notice such interlineations in the jurat.

There must be eight days between the teste and return of a writ of summons

sued out against a member of parliament.

Where a rule nisi is moved to set aside the service of process, on grounds disclosed in affidavits filed, and the irregularity complained of is in the copy of the process annexed to the affidavit filed, and does not appear in the affidavit alone, the rule will be discharged.

Motion to set aside the summons issued in this cause for irregularity, with costs, "upon grounds disclosed on affidavits filed."

There were two affidavits filed. One, to which a copy of the summons was attached, which stated that the annexed copy of summons was served on the defendant, on the evening of Monday, the first day of this term. The other stating that the præcipe for the summons in this cause was for a summons returnable the first day of this term, the præcipe being filed and the summons tested the first day of this present term. And it was objected that, according to our rule of court, not less than eight days inclusive shall intervene between the teste and return of all mesne process hereafter to be sued out in any personal action.—Rule of Mich. 4 Geo. IV.

It was objected to this affidavit that it was irregular, because there was an interlineation, which was not noticed or in any way authenticated; and secondly, that it did not shew when the summons itself was made returnable, and that the first affidavit would not help, for it disclosed nothing but that the defendant was served with the annexed copy: and according to the case of Bates v. McMahon, the copy of process could not be looked at, not being referred to in the rule nisi.—2 U. C. R. 178.

DRAPER, J.—I think the first objection respecting an interlineation in the jurat not tenable, for I find no authority that the Commissioner must put his initials opposite every interlineation in the affidavit itself, or notice such interlineation in the jurat.

Then as to the objection to the summons. I am of opinion there should be eight days between the the teste and return; but I do not think the objection is sufficiently pointed out in the affidavits. The one shews what the præcipe was, not what the summons contained; the other only shews the annexed copy was served; and on the authority of the case referred to, the copy cannot be looked at to ascertain the alleged irregularity: the rule must therefore be discharged with costs.

Per Cur .- Rule discharged.

CITY BANK V. ECCLES.

When a rule, with a stay of proceedings, has been taken out and served, toshew cause why a verdict rendered should not be set aside for irregularity

—a notice of argument of demurrer, given subsequently to the rule, and setting down the same for argument—will be set aside with costs.

Where it appears on the note of the learned judge at the trial, that a verdict should be entered for the plaintiff on one count; and for the defendant on the other, and a verdict has been erroneously entered for the plaintiff on both counts—this is a mere mistake in the entry on the record, which may be amended by the judge's notes.

Motion to set aside the notice of argument of demurrer in this cause, and the setting down the same demurrer for argument, on the ground that these steps were taken after the granting and serving of a rule to shew cause why the verdict rendered in this cause should not be set aside for irregularity, which rule contained a stay of proceedings in this cause.

DRAPER, J .- The cases cited in argument appear to me to sustain the objection, particularly that of Murray v. Silver, 14 N. S. Law Jl., Com. Pleas. 236-also reported in 1 Com. Bench, 638; 4 T. R. 176; 5 Dowl. 168; and the rule must therefore be made absolute to set aside the proceedings complained against for irregularity, with costs.

Per Cur .- Rule absolute.

In this case also, there was a motion to set aside the verdict for irregularity, the cause having been taken by Mr. Justice Sullivan out of the order in which it stood on the list at nisi prius, in the absence of counsel retained for the defence, who was at the time engaged in another cause at the same sittings of nisi prius, before Mr. Justice Macaulay, and on the representation of the plaintiff's counsel, that it was undefended.

There were two counts in the declaration, one on a bill of exchange, to which there was a demurrer; the second on an account stated, to which non-assumpsit was pleaded.

The plaintiff's counsel only assessed damages on the first count, and stated that he should offer no evidence on the second, on which therefore the defendant would be entitled to a verdict, and on the notes of the learned judge it was so minuted, though a general verdict for the plaintiff was erroneously endorsed on the record.

Since this motion was made the entry on the record had been amended 5 U. C. Q. B.

by the judge's notes, and a verdict for the defendant entered on the second

DRAPER, J.—Under these facts as they now appear, I think this rule must be discharged; but as there was a verdict erroneously taken for the plaintiff on the second count, on which he clearly was not entitled to succeed, and as for all that appears the defendant moved in ignorance that this was a mere mistake in the entry on the record, the rule will be discharged without costs.

Per Cur.—Rule discharged without costs.

BAYS V. RUTTAN, SHERIFF.

Where judgment of non-suit has been entered against the plaintiff, he will not be allowed to take any proceedings in the suit, or to call on the defendant to answer him.

In this case Read moved to strike out the demurrer set down in the paper of causes for argument, on the ground that judgment of non-suit was previously signed, and that the plaintiff should pay the costs of this application. His affidavit shewed, that judgment of non-suit was signed in this cause on the 30th June last, against the above plaintiff, that there was a demurrer of the plaintiff to a plea or pleas of the defendant at that time, and that the plaintiff had set down the said demurrer for argument during this present term.

Eccles shewed cause, and contended in the first place, (as he shewed by affidavit) there were two causes between the same parties, in each of which there was a demurrer to the plea or pleas of the defendant—that judgment of non-suit had been entered in one only of the said suits, and only one of the demurrers set down for argument, the style of the causes being the same; and that the defendant's rule was uncertain as to which of the two causes was referred to, as it did not in terms move to strike out the demurrer "in this

He also insisted that the plaintiff had a right to get judgment on demurrer in the cause, although judgment of non-suit had been entered. He cited Paxton v. Popham, 10 Ea., 366.

DRAPER, J .- I think the affidavit, on reading which the rule is drawn up, coupled with the rule, sufficiently shews that the demurer is in the same cause as that in which judgment of non-suit is entered; for it is sworn the judgment of non-suit is in this case, and that there was at the time of entering it, a demurrer of the plaintiffs, which can only refer to the plaintiff in this cause, which demurer is set down for argument,

As to the other point I think the rule must be made absolute. The form of the judgment, that the plaintiff take nothing by his writ, and the defendant go thereof without day, is conclusive that the plaintiff cannot, so long as that judgment stands, take any proceeding, or call on the defendant to answer him. -4 T. R. 537.

The language of Buller, J., in Kempland v. Macaulay, is in point, "I

the record were manifestly erroneous, the plaintiff who has made default by suffering a non-suit, can never have a judgment afterwards in his favour." I refer also to Jones v. Gibson et al., 5 B. & C. 768, as confirming the same view.—Savage v. Hodges et al., 1 Dowl. N. S. 16; 5 Jur. 756; Milton v. Griffiths, 1 Dowl, N. S. 769; 6 Jur. 463.

Per Cur. - Rule absolute.

NORTHGOTE V. HODDER.

It is not necessary to obtain a rule of court, or a judge's order, to warrant the issue of a writ of inquiry to the District Court.

A plaintiff enters his record at the assizes, to assess damages—the cause does not come on in its order, and is made a remanet—the plaintiff subsequently sues out a writ of inquiry to the district court—the defendant moves to set this writ aside, and all subsequent proceedings, for irregularity, the cause having been made a remanet at Nisi Prius—but Held, per Cur., writ of inquiry regular.

In this case the facts were, that after interlocutory judgment, the plaintiff entered his record at the last assizes for the Huron District, to assess damages; the cause did not however, come on in its order, and the case was therefore made a remanet. Afterwards the plaintiff sued out a writ of inquiry, directed to the judge of the district court for the Huron District, and gave notice of assessment for the next sittings of the said district court.

Cameron, Q. C., obtained a rule in this court to set aside the writ of inquiry, and all subsequent proceedings, for irregularity, with costs, on the ground that the cause had been made a remanet, and that no rule or order for issuing the writ of inquiry had been obtained from the court, or any judge thereof, since the cause was made a remanet.

Wilson, A., shewed cause, and cited Sayer, 214; 2 Saund. 106; 7 T. R. 446; and 4 Taunt. 148.

Draper, J.—As to the general question raised, of the necessity of a rule of court, or a judge's order, to warrant the issue of a writ of inquiry, I am of opinion, that the plaintiff has just as much right to sue out such writ of his own motion, as he has to make up and enter a record of nisi prius under the act of 1822, for the assessment of damages. Then the only question in this case is, whether the plaintiff, having elected to proceed in one way, can abandon it and proceed in the other? Apart from the effect of the record being made a remanet, the case in 4 Taunt., which was in error, appears conclusive, for there the party sued out a writ of inquiry, which is entered on the roll; and without its being executed or returned, got judgment with damages awarded by the court itself, which shews that the court did not hold him bound by his election to assess his damages by writ of inquiry, but considered him at liberty to abandon it.

Then the cause being made a remanet, shews only that the plaintiff was guilty of no default in not assessing the damages at the assizes. According to English decisions, the party ultimately prevailing gets the costs, where the cause goes off on a remanet; so that no prejudice is in that respect caused

to the defendant.—5 Burr. 2693. If the plaintiff had assessed his damages at the assizes, he would be precluded from endeavouring to recover now by carrying down the same question to another jury, on a writ of inquiry; and if he had been guilty of default in not assessing, when he had an opportunity, at the assizes, he must have paid the defendant his costs; but here he has attempted to assess his damages in one way, which failed, through no default of his, and he is not, in my opinion, precluded from resorting to another.

Per Cur.-Rule discharged.

HAWKE V. DUGGAN,

Where a rule issued, as of Easter Term generally, to enlarge the time for making the award until the last day of the term, Held per Cur., that the rule related back to the first day of the term, and must be taken to extend the time mentioned in the original submission, and to operate as an admission that the time had not then expired.

The absence of a rule making the order of nisi prius a rule of court, should be shewn by something more than mere inference from the statements

made in the affidavit filed.

Where an award upon a reference at nisi prius (a verdict having been taken subject to such award) can be said to rest on a verdict only, there being no other matters in difference left to the arbitrators, but those in the cause, judgment may be entered after the first four days of the succeeding term. But where the reference can be said to include matters in difference between the parties not included in the cause, judgment cannot be entered until after the end of the next succeeding term. In other words, in the first case, the party against whom the award has been rendered has the first four days of the term within which to move to set the award aside: and in the second case, he has the whole of the term.

Cameron, Q.C., last Trinity Term, obtained a rule nisi, on reading the rule of reference and enlargement, the copy of award and affidavits filed, to shew cause why the final judgment and execution in this cause should not be set aside for irregularity, with costs. Ist. Because the time originally appointed for making the award having expired without an enlargement, no judgment could be entered on the verdict, and the award could only be enforced by action. 2nd, That the rule of reference was not made a rule of court. 3rd. That the judgment was entered too soon; the plaintiff having the whole of Trinity Term to move against the award. Also, why the award should not be set aside on the grounds—Ist. That it was made after the time limited for making it had expired. 2nd. That due notice was not given to the plaintiff. 3rd. That all matters in dispute were not awarded on the award being confined to the cause—with stay of proceedings.

The affidavits on which the rule was made, stated that judgment was entered on the 7th of August, 1848, (Trinity Term beginning on the 31st July). "That the annexed are true copies of the rule of reference at "nisi prius, and the rule of court enlarging the time for making the "award in this cause filed among papers in this cause;" and this affidavit, sworn on the 9th August, further stated "that there is no other

"rule, order, or consent, for extending the time for making the award." The order at nisi prius was that a verdict be taken for plaintiff for 501., subject to be reduced, or a verdict entered for the defendant for any amount found to be due by the award of D. G. Miller, Esquire, "by "whom are to be decided all issues and legal points, without reference "to those actually entered on record, and to whom the same are hereby "referred."

Cameron contended, that from this affidavit it sufficiently appeared the submission and order of nisi prius had never been made a rule of court. But attached to and mentioned in the same affidavit, was a rule of court made in Easter Term last, "on reading the rule made this "present term," and by consent of both parties, enlarging the time for making the award until the last day of that term, viz., 24th June.

An affidavit of Mr. Brock's, plaintiff's attorney, stated service on him of a notice to attend the arbitration at 10 o'clock in the forenoon of 22nd June, 1848, and he swore that he did "attend at the place and on the "day named in the said notice, the hour having been changed to four "o'clock," but found neither defendant nor the arbitrator. (Mr. Brock did not in terms state at what hour he did attend.) That he then went away, and on his return met the defendant, who wished him and the defendant, also present, to return and attend the arbitration, which he refused, having other engagements; and that he had no other notice since that time, nor did he consent after that time to enlarge the time for making the award, or to any meeting for such purpose. He annexed a copy of the award as left at his office, not saying when. The award was dated the 23rd June, 1848. It recited the order of nisi prius (not referring to its having been made a rule of court, or to any rule for enlarging the time, as mentioned in the order of nisi prius), and awarded as follows; "I having found the said plaintiff not entitled to any sum "whatever from the said defendant, and having found also the sum of "921. 15s. 5d. to be due to the said defendant, by and from the said "plaintiff, do award, order and adjudge, that the said verdict, entered "for the plaintiff, be set aside, and that a verdict be entered for the " defendant, for the said sum of 921. 15s. 5d."

The plaintiff's affidavit stated that, at the hour of four in the afternoon of the 22nd June last, he attended with Mr. Brock; but finding neither the arbitrator or the defendant, "though he waited some time after the "hour appointed," he left, and had had no subsequent notice, nor has attended since, or consented to further enlargement since.

Mr. Cameron swore, that in Easter Term he was spoken to by the arbitrator, and was asked to agree to an extension of time for making the award, "as the time had expired without an enlargement." That he declined, and that the time was not further extended to his knowledge, and that on the following day the arbitrator informed him he had come to a decision without any person being present on behalf of the plaintiff, but that he supposed his award was insufficient, "as it had "been made after the time for making it had expired."

The defendant during this (Michaelmas) term shewed cause on affidavits. 1st. He produced "a true copy of the rule making the order of "nisi prius in this cause" a rule of court, and swearing (not when it was made, but that) "the original thereof is filed among the papers on "which judgment was entered," and with this he produced a copy of the rule enlarging the time for making the award, and of the consent thereto, signed, by Mr. Brock for the plaintiff. This consent was dated in Easter Term generally, and the rule appeared to be as of Easter Term generally, though dated on the 19th of June. He produced also a copy of a notice, similar to that stated in Mr. Brock's affidavit, for ten o'clock in the forenoon of 22nd June, and gives proof of service of it, and the affidavit verifying the service added, that the deponent having been informed by the defendant that the plaintiff was apparently desirous of evading the reference, and meeting Mr. Brock a few minutes after nine in the morning of the 22nd June, reminded him that the arbitration was to take place at ten, when Mr. Brock told him that Mr. Cameron would attend, and that immediately after he told the plaintiff himself when the arbitration would take place,

The defendant swore that, in order to cover enlargements previously made, and to save the expense of a rule on each, the consent was given to embrace the whole, and to extend the time to the last day of Easter Term, and that he never heard it pretended that the award was not made within the enlarged time. He added his belief that the plaintiff intentionally declined attending the arbitration, with a view of defeating the reference.

The arbitrator also made an affidavit, that an arbitration took place on the 22nd June, 1848, pursuant to the approintment granted by him (i. e. that for ten o'clock in the forenoon), and that the due service of such appointment was proved before him. That he had seen Cameron's affidavit, and was confident he was mistaken, as he had noconversation with him until the 22nd June, and after he had heard the defendant's evidence under this appointment. That in the afternoon of that day he saw Cameron in the library at Osgoode Hall; and as the plaintiff had not appeared, or been represented at the arbitration, hementioned the circumstance and advised him to give his evidence. That Cameron referred him to Mr. Brock. That he (the arbitrator) did say something about his apprehension the award would not stand, but this had reference solely to points of law, which it occurred to him would be raised on the record and the peculiar wording of the order of reference. That he offered Cameron then to receive evidence up to the noon of the following day, which he understood Cameron to refuse.

DRAPER, J.—As to the first objection, that the time originally appointed for making the award having expired without an enlargement, no judgment could be entered on the verdict—it appears that a rule issued as of Easter generally, which would *prima facie* have relation to the first day, enlarging the time for making the award to the last day of that term. It is true the rule itself is dated on the 19th June, which was

some days after the first day of term. But there are two answers to this, the latter of which at least is sufficient. 1st. That the consent to enlarge the time must be taken with reference to the original submission, and therefore must, if intended to have any effect, extend that time, and operate as an admission that the time had not then expired. 2nd. That the defendant expressly swears that it was made as well to cover enlargements previously made, as for an extension to the last day of term. So that it would seem clear the time for making the award had never been allowed to expire—and this objection fails.

The second objection is, that the order of reference had not, when this motion was made, been made a rule of court. But in answer to this, the defendant produces a copy of such a rule of court, entitled of Easter Term, and dated the 19th of June, being the same day on which the rule enlarging the time for making the award is dated; and this latter rule is drawn up, on reading the rule made this present term, which, in the absence of any other rule, I think must be taken to mean the rule making the order of reference a rule of court. Besides which, I think it very questionable if the only statement in the plaintiff's affidavits, on which he relies to sustain this objection, refers to it at all; for the words "that there is no other rule, order or consent, for extending the time for making the award," have no direct application to the absence of a rule making the order of nisi prius a rule of this court, and there is nothing else except mere inference in this affidavit to shew the absence of such rule. I think therefore this objection fails.

The third objection is that the judgment was entered too soon. depends upon whether the award rests on the verdict only, or whether the reference is to be treated as more general, i.e., as including matters in difference between the parties, not included in the cause. In the former case, it appears to me the arbitrator is merely substituted for the jury, and that any motion to set aside the award, which is in form and effect a verdict (and bad if not so given*), must be made within the first four days of the term following that in which the award was made; in the latter. the award may be moved against during the whole of the succeeding term. Then are there any other matters in difference, but those in the cause? The nature of the action, or of the pleadings, is not shewn by either party; the words of the order of reference are "that a verdict be taken "for plaintiff for 50%, subject to be reduced, or a verdict entered "for defendant for any amount found to be due by the award of D. G. "Miller, Esquire, by whom are to be decided all issues and legal points, "without reference to those actually entered on record, and to "whom the same" (i.e. issues and legal points) "are hereby referred," so as he make his award, &c. There is nothing to shew that any issues or legal points, other than those apparent on the record, were submitted to the arbitrator, or that he has left anything which the record contained

^{*}Mortin v. Burge, 4 Ad. & El. 973; Hayward v. Phillips, 6 Ad. & El. 119, and cases there recited; Wood v. Moody, Hil. 9 Vic. U. C. Reports, 80.

undisposed of, or that his award contains anything not strictly within the issues raised on the record; for the award is, "that the verdict entered for "the plaintiff be set aside, and that a verdict be entered for the defendant "for 921. 15s. 5d.," which, assuming a plea or a notice of set-off, would be strictly right under our statute. I do not see, therefore, that the plaintiff has shown that the judgment was entered too soon, for I do not see that the defendant was not at liberty to enter it after the expiration of the first four days of Trinity Term last.

The rule is also to set aside the award. The first ground is that it was made after the time limited. This is already disposed of on the same objection being raised to the judgment.

and. That due notice was not given to the plaintiff. It is not denied that notice for ten o'clock in the forenoon of the 22nd June was given, at which time the arbitrator swears he attended, pursuant to the appointment granted by him for that purpose. Mr. Brock's affidavit states the hour had been changed to four o'clock. The affidavit of the arbitrator is quite inconsistent with his having made an appointment for four in the afternoon of that day, for he swears that on that very afternoon he told Mr. Cameron that the plaintiff had not appeared, or been represented at the meeting in the forenoon, and advised him to give his evidence. And the affidavit of Edward B. Smith, which states his particularly reminding both Mr. Brock and the plaintiff of the appointment, about nine on the morning of the 22nd, is also inconsistent with the putting it off until four o'clock; and the objection is not so much the want of notice, as that, notwithstanding the hour had been changed, the arbitrator proceeded at the time first named. The words of the appointment are strong, viz., "at which time and "place I shall peremptorily proceed with said arbitration, unless sufficient "cause be then and there shown to the contrary."

The arbitrator apparently made no change and knew of none; and Mr. Brock's affidavit omits to state how, when, or by whom the change was made. It is true the defendant has not sworn he did not make it; but it is not sworn on the other side that he did; and when I drew his attention to it the last day of term, he desired to supply a further affidavit, which I did not feel at liberty to receive.

It certainly appears to me that the proper course would have been to have attended the arbitrator, particularly after what the witness Smith has sworn; and that Mr. Brock's affidavit is not strong enough to sustain this objection. But if it were, the question would again arise whether this application does not come too late, with regard to which it is to be observed none of the affidavits on the part of the plaintiff shew when he first had notice of the award.

As to the last objection, that all matters in dispute were not awarded on, the observations made on the third objection to the judgment dispose of this.

On the whole, the only point on which I have any doubt is the objection of the change of time for the hearing of the parties before the

arbitrator, with regard to which there is obviously a misapprehension on the plaintiff's part; for on his affidavit no one would suppose, what turns out to be true, that the arbitrator held a meeting and took all the evidence offered by the defendant on the morning of the 22nd June. The omission on the part of the plaintiff to attend and give evidence of his claim, would not per se entitle him to succeed on this application. He must shew a good reason for non-attendance. The statement that the hour was changed would be a good reason for non-attendance at the first named hour, but that statement is not made with any explanation of when or by whom the change was made; and though not denied in express words, it is met by the affidavit of Smith and of the arbitrator, to such an extent as to preclude me from setting aside the award on this sole ground, and particularly when, for all that appears, the application comes too late.

It is quite possible this award may not do justice between the parties, but such an application would not justify the court in making this rule absolute; and upon the facts shewn it appears to me, after much consideration, that the plaintiff has failed to support his application, and the rule must therefore be discharged.

Per Cur.-Rule discharged.

LAVERTY V. PATTERSON.

A judgment entered upon a cognovit by a deputy clerk of the crown, in an outer district—no previous writ or proceedings having been issued or taken

out of or in, such office-is in itself void.

Semble, however, that if the judgment had been transmitted to the principal office in Toronto, and an entry had been made there so as to constitute an entry of judgment on the face of the judgment roll, or so as in the terms of the statute, 8 Vic., ch. 36, 54 to enter the judgment of record and docket it in the principal office—it might have been upheld.

Helliwell moved to set aside the judgment entered on cognovit actionem, and all subsequent proceedings, in this case, on affidavits disclosing the following facts. That the judgment was entered in the office of the deputy clerk of the crown for the district of Colborne, on the 16th March last, "without any writ or other previous proceedings having been issued out of or in" such deputy's office. That the judgment and papers were either on the same or the next day transmitted to the principal office in the Home District—that a writ of fi. fa. was issued by the said deputy clerk of the crown, on the 26th April last, under which the sheriff had made a large sum of money, which he held till it should be decided to whom it was to be paid. That since the judgment was so entered, and about the 25th of May last, a commission of bankruptcy issued against him, and that the assignees made this application. That the judgment was received and docketed in the principal office at Toronto, on the 20th March last.

A. Wilson shewed cause. He urged that the sheriff of the Colborne District, about the 1st July last, applied under the interpleader act for protection against the assignees of defendant who were claiming the

goods seized under the fi. fa. in this case—that the assignees appeared and opposed that application—but that on that occasion neither they, the sheriff, or the defendant objected to the regularity of these proceedings; and he contended they ought not to be heard to do so now. He argued, also, that if the defendant entered an appearance, though he had not been served with process, the action would then have been commenced in the outer district, and it was incumbent on the parties making the application to exclude every mode by which the action could have been so commenced, and they had only shown that no writ was issued. He also produced a copy of the judgment roll and of the entry in the docket-book, from the principal office at Toronto, and argued that admitting that an entry by the deputy clerk of the crown, in an outer district, would be irregular, this judgment was regularly entered here, and was not avoided by the ineffectual or irregular attempt of the inferior officer to enter it. And that if so, then the rule should be discharged, because the f. fa. was not directly moved against, but was only included in the words, "subsequent proceedings," and if the judgment stood, the subsequent proceedings would stand, although if there had been an independent motion against the fi. fa. it might have prevailed. He also contended that the application came too late.

DRAPER, J.—In the two cases LeMesurier v. Brondgeest, and Commercial Bank v. Brondgeest, the court, last term, set aside a judgment entered in the office of the deputy clerk of the crown in an outer district, on a cognovit given in a case in which there were no proceedings antecedent to the giving the cognovit and the entry of judgment, on the application of the assignees of defendant, who had since become bankrupt.

After these decisions, unless it is made to appear that there is a judgmen^t regularly entered in the principal office, in this case, the rule must be made absolute.

The judgment roll (a copy of which is produced), on the face of it shows no judgment signed except by the deputy clerk of the crown in the outer district, and the only thing done on this roll in the principal office, is to mark it "docketed;" and also, "received and docketed, the 20th March, 1848;" and in the docket-book, the entry of the cause is "Entered and docketed the "twentieth day of March, in the year of our Lord, 1848, as of Hilary term, "in the 11th year of the reign of Queen Victoria." The statute directs that the deputy clerk of the crown shall transmit to the principal office all judgments by him entered, "and that upon receipt thereof such judgment shall "be entered of record and docketed in the principal office"—8 Vic., ch. 36., sec. 4.

Here there appears no actual entry of any judgment in the principal office; for I do not think the endorsement on the judgment roll is an entry of judgment, and no other act is shewn to be done in that office; and the entry in the docket book is not warranted by any thing appearing on the face of the judgment roll, which shows judgment signed on the sixteenth, and not on the twentieth of March, as the entry purports.

Had an entry been made in the principal office so as to constitute an

entry of judgment on the face of the judgment roll, or so as, in the term of the statute, to enter the judgment of record in the principal office, and thu to warrant the docketting which has been made, I am not prepared at pr e sent to say that it would not have been sufficient to uphold it. But nothing of this sort has been done, and therefore the efficiency of the judgment depends on what has been done in the outer office, which is insufficient according to the cases referred to.

I consider the effect of these decisions to be, that the judgment so entered is void, and therefore I do not think the objections of waiver or of delay can avail. The rule must therefore be made absolute.*

Per Cur-Rule absolute.

CUVILLIER ET AL. V. PRIVAT.

Where issue was not joined till about the middle of August, and the plaintiff not having given notice of trial for the October assizes following, the defendant moved in the November term for judgment, as in case of a non-suit—Held, per Cur.—that the application was made too soon after issue had been joined,

A. Wilson moved for judgment as in case of non-suit, for not proceeding to trial pursuant to the practice of the Court, on affidavit that notice of trial was given on the 22nd of August, 1847, for the fall assizes, 1847, for the Home District; and that plaintiff did not proceed to trial, nor have they ever proceeded to trial in the cause—the venue being in the Home District.

Cameron, Q. C., shewed cause, stating that issue was only joined about three months ago, before the last assizes for the Home District—which Wilson admitted.

Draper, J.—The stat. 14 Geo. 2, ch. 17, sec. 1, authorizes a defendant, when issue is joined, and the plaintiff neglects to bring such issue to trial, according to the course and practice of the court, to apply for judgment as in case of non-suit at any time after such neglect. The first question therefore is, when was the issue joined? Giving notice of trial may be prima facie evidence that issue was joined at the time, though capable of being answered—and still more entering the record at nisi prius, in which latter case, I should think the plaintiff ought not to be heard to say issue was not joined as of the term immediately preceding that act. Proof that notice of trial was given, is not necessarily sufficient to entitle a party to judgment as in case of non-suit, for notice of trial may be given on pleadings concluding to the country before issue is joined, and issue in fact may not be joined until after.

In this case it is admitted issue was not joined till about three months ago, i.e., about the middle of August, either in or after last term—and the plaintiff not having given notice of trial for the last assizes, the defendant comes too soon with the application, as the plaintiff has been guilty of no default since issue joined, which entitles the defendant to judgment as in

^{*} See Walton v. Hayward, U. C. Reports, Easter, 2 William IV.; Charlsworth v. Ellis, 7 Q. B., 678.

case of a non-suit.—Crowther v. Duke et al., 7 Dowl., 409; 3 Jur., 289; Davis v. Williams, 3 Jur. 171; Wright v. Oldfret, 8 Dowl. 849; Gordon v. Smith, 5 Scott, 560; 10 Jur., 392; 2 Dowl. N. S., 118, 326; 10 M. & W. 78; 10 M. & W. 76; 7 Dowl., 151, 867; 6 Bing. N. C., 273; 11 M. & W., 544; 4 Dowl., 13; 8 Bing 292; 5 M. & W. 493; Smith v. Rigby, 3 Dowl 705; 2 H. Bl., 280.

Per Cur.—Rule discharged.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

QUEEN'S BENCH AND PRACTICE COURTS,

FROM EASTER TERM, II VICTORIA, TO MICHAELMAS TERM, 12 VICTORIA, INCLUSIVE.

ACTION.

Goods sold and delivered.] "Received of -- six boxes of axes, to be sold for him on commission, and when sold, I agree to account to him for those sold at the rate of, &c., and return the remainder unsold on demand;" Held, per Cur., that an action for goods sold and delivered, would not lie for any of the axes not returned.-Dods v. Durand, 623.

AFFIDAVIT.

Affidavit of Service of a Declaration in Ejectment. Time when served.] The affidavit of service of a declaration in ejectment, and notice upon the tenant, must shew the time when the declaration, &c., was served,-Doe dem. Sherwood v. Roe, 319.

Commissioner. Interlineations. Yurat. 1 It is not necessary that the commissioner should put his initials opposite interlineations in the affidavit itself, or notice such interlineations in the jurat .- Lyster v. Boulton, 632.

AMENDMENT.

Amendment at the trial. When Amendment must be made.] Variance between proof and deed declared on -Counsel must determine at the tiff sued the defendant in case, upon

trial whether they will amend under the statute-leave cannot be reserved to amend the record afterwards .-McFarlane v. Brown, 471.

ARBITRATION,

Award. Setting Aside. Affidavit of Merits.] The court will not set aside an award upon an affidavit of merits alone, except upon manifestly clear and strong grounds.-Scobell v. Gilmour, 48.

Award. Submission. Pleadings.] Where the submission does not require the award to be made, and ready to be delivered within a certain time, it is not necessary to aver that the award was made within a reasonable time, neither is it necessary to aver notice of the award to the plaintiff .- Adams v. Ham, 292.

Enlargement of time by Award. Arbitrators.] Where no power has been given by the rule of reference to the arbitrators to enlarge the time for making an award, the court have, notwithstanding, the power under our statute to enlarge the time in the exercise of their discretion, upon the affidavits and papers filed .- Jones v. Russell, 303.

Award. Setting aside.] The plain-

certain injuries specifically set forth in the declaration, as his cause of action. At the assizes the case was referred to arbitration, and a verdict was taken for the plaintiff for 1000/. subject to be increased or diminished by the award. By the terms of the reference, the arbitrators had power "to take into consideration the various offers made by the defendants, and finally to dispose of and settle all the matters in difference, awarding if they should think fit the payment of an entire sum in full satisfaction of all past and future demands, &c." Upon this submission the arbitrators declared, that having taken into consideration the matters and things which they were by the said order empowered to take into consideration, they awarded that the verdict for the plaintiff be increased to 12871. 10s., with costs to 46l. 10s. And they concluded the award thus, "and the said sums so to be paid as aforesaid, &c., we do award, order, and determine to be, and the same are for all purposes to be taken, and held to be when paid, in full satisfaction of all past and future demands of the plaintiff against the said defendants, for or in respect of the subject matter, or subject matters of the said cause, and all and every part thereof." defendant moved to set aside the award, upon the following grounds: 1st, because the arbitrators, after hearing evidence (as stated in affidavits filed) of other injuries than those mentioned in the declaration, did not make their award "of all matters in difference" as submitted by the reference, but confined it to the subject matters arising out of the cause of action in this suit. because they did not distinguish in their award, the sum allowed in the

other matters in difference; but Held per Cur., award under the submission good. Semble, that upon a general reference at Nisi Prius, the arbitrators may, in making up their award as to the amount of verdict, be governed by their finding upon matters in favour of the defendant, which could not have been brought in question on a trial of the action; also, that where the verdict is intended to be a final settlement between the parties, the arbitrators may take into consideration matters not embraced within the technical statement of the causes of action in the record. when advanced on the part of the plaintiff.-Watson v. Gas Company,

See Ruthven v. Ruthven, 273, 276, 279, under "Practice;" also, Moulson v. Eyre, 470, "Practice."

Enlargement of Award. Entry of Judgment on Award, when.] Where a rule issued, as of Easter Term generally, to enlarge the time for making the award until the last day of term; Held, per Cur., that the rule related back to the first day of term, and must be taken to extend the time mentioned in the original submission, and to operate as an admission that the time had not then expired.

The absence of a rule making the order of nisi prius a rule of court, should be shown by something more than mere inference from the statements made in the affidavit filed.

matters in difference' as submitted by the reference, but confined it to the subject matters arising out of the cause of action in this suit. 2ndly, because they did not distinguish in their award, the sum allowed in the cause from the sums allowed for the

after the first four days of the succeeding term. But when the reference can be said to include matters in difference between the parties not included in the cause, judgment cannot be entered until after the end of the next succeeding term. In other words, in the first case, the party against whom the award has been rendered has the first four days of the term within which to move to set the award aside; and in the second case, he has the whole of the term.-Hawke v. Duggan, 639, '

ARREST.

Case referred to Arbitration af-Discharge of Priter. Award. soner.] Where a defendant was arrested, and in close custody on mesne process, and pendente lite, the cause was referred by a parol submission to arbitration, followed by an award in the plaintiff's favour for a sum payable by instalments, one of which was due at the time an application was made to discharge the prisoner from close custody in consequence of the award; Held, per Cur., that the prisoner, under these circumstances, without shewing payment of the instalment due, was entitled to his discharge .-Ruthven v. Ruthven, 279.

Action for malicious Arrest. Pleadings.] In an action on the case for malicious arrest, under a ca. sa., it is sufficient for the plaintiff to aver in his declaration, that the defendant maliciously sued out a ca. sa., when he had no reason to believe that the plaintiff had made, &c. He need not state that he (the plaintiff) had not made a fraudulent conveyance, &c.—McIntosh v. Demeray, 343.

What an arrest under a ca. sa.] The deputy sheriff, having a ca. sa. to arrest a party, went to his house with the writ in his possession for that purpose—he told him of the process, and being assured that a friend of his (the debtor), who was then from home, would go his bail, he returned home and did not insist on the debtor coming with him. Afterwards the sheriff went again to the debtor's house, and told him. without laying hands upon him, that he must come to his (the sheriff's) house, which he did-and remained there, but not under actual constraint, till discharged : Held, per Cur., that under these facts-there had been no legal arrest of the debtor on the first visit of the sheriff-that the merely insisting upon the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest-but that the debtor in having gone to the sheriff's house as desired, and having remained there, though without constraint, till dischargedhad been duly arrested.

In an action on the case for malicious arrest under a ca. sa. it is sufficient for the plaintiff to aver in his declaration that the defendant maliciously sued out a ca. sa., when he had no reason to believe that the plaintiff had made, &c. He need not state that he (the plaintiff) had not made a fraudulent conveyance, &c.—McIntosh v. Demeray, 343.

ASSUMPSIT.

Pleadings. Averment of Promise.] Where a defendant is sued upon a promise to continue a former agreement, which at the time of the alleged promise, is about expiring, the plaintiff should state in his declaration the precise terms of the former agreement, and also aver

that the terms so stated, composed the whole of the former agreement.

In an action of assumpsit, the promise of defendant should be alleged in direct terms; the averment therefore, that defendant addressed a letter to plaintiff, in which he promised, &c., not being a precise allegation that defendant promised, but that the letter says he did—is bad.—Barnes v. McKay, 246.

On Account stated in.] Where A. as part consideration for the purchase of certain timber from B. promises C. to pay B.'s debt to him of 20l., and pays 10l. to C., and is to pay the remaining 10l. the next morning; Held, per Cur., reversing the judgment in the court below, that in an action of assumpsit by C. against A., C. could recover the 10l. on the account stated.—Fergusson v. Kerr, 261.

ATTORNEY AND SOLICITOR.

Duty of, under ordinary Retainer, as to execution. Pleadings. It is no part of an attorney's duty, under the ordinary retainer, to issue an execution and collect the money upon his judgment. His authority ceases with the judgment. Where, therefore, in an action against an attorney, the plaintiff states the promise to be, that the defendant would prosecute and conduct a certain action in a skilful and diligent manner, and then lays as a breach of defendant's undertaking to prosecute the action, &c., that he delayed to issue execution, without averring any special retainer to do so; Held, per Cur., declaration bad on general demurrer.-Searson v. Small, one, &c., 259.

Suit by. Pleadings. Copy of Bill. tiff—this court, in the exercise of its Admission of Bill.] A defendant equitable jurisdiction, will interfere sued by an attorney for his fee, is to prevent the attorney from being

entitled, one month before action brought, to have a copy of the bill, signed, &c., according to the statute, even though he may have explicitly admitted the amount of the bill to be due. Where, therefore, to a declaration by an attorney for his fees, containing a count upon the account stated, the defendant pleaded, no bill delivered, &c., and the plaintiff demurred; Held per Cur., plea good.—Dempsey v. Winstanley, 317.

Who to sign Bill.] The attorney who commences the action, must sign the bill of costs delivered; where therefore three attornies composing a firm commenced the action, and only one of them signed the bill; Held, per Cur., bill insufficient.—Sullivan, Smith & Hector v. Bridges, 322.

Under Stat. 8 Vic. ch. 48, sec. 1st, 8th, and 18th, Assignees of Bankrupt to sue for negligence.] Under the 1st, 8th and 18th clauses of the Insolvent Debtor's Act, 8 Vic. ch. 48, the right to sue an attorney for negligence, vests in the assignee of the bankrupt plaintiff, not in the plaintiff himself.—Alexander v. A. B. and C. D., attornies, 329.

Writ to District Court, when Attorney Defendant.] Under the 8th Vic. ch. 13, sec. 51, a writ may go to the district court to try an ssue in which an attorney is defendant.

—Martin v. Gwynne, 245.

Notice by Plaintiff to Defendant. Costs.] If after notice by the plaintiff's attorney to the defendant, a bona fide settlement—or if without notice a collusive settlement—be made by a defendant with a plaintiff—this court, in the exercise of its equitable jurisdiction, will interfere to prevent the attorney from being

Langle v. Fetterly, 628,

AUCTIONEER.

Conditions of Sale. Construction of Conditions as to Credit and Cash, By an auctioneer's conditions of sale, purchasers to an amount exceeding £30 were to have "six months credit, giving approved endorsed notes;" Held, per Cur., (Robinson, C. J., dissentiente) that a purchaser over £30 upon these terms was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash, upon his refusal to furnish the endorsed note; and as he could not consequently be sued on the common count for goods sold and delivered until after the expiration of the credit, that to a special action brought by the auctioneer against the purchaser, before the credit had expired, for not giving the endorsed note when requested, a plea of set-off would be inadmissible.-Wakefield v. Gorrie, 159.

BAIL.

Action on Bail Bonds. Pleading.] Debt on a recognizance of bail. Plea, no ca. sa. Replication setting out a ca. sa., directed to the sheriff of the Newcastle District, averring that district to be the district into which the venue was laid. and concluding with a prayer to the court to inspect the record, and giving a day for that purpose. Rejoinder traversing the venue being laid in the Newcastle District, and avering it to have been laid in the Victoria District. Demurrer, 1st, because the rejoinder was a departure from the plea; 2ndly, that a perfect issue having been joined already by the replication, the defendants were that, notwithstanding the deed, the

unjustly deprived of his costs .- | precluded from adding any further pleadings; Held, per Cur., rejoinder good .- Robertson v. Goin et al. 72.

BANKRUPTCY.

Notice of a Declaration of Insolvency when an Act of Bankruptcy.] Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall issue upon it within two months. and provided that the execution creditor, or his attorney, was aware of the fact before suing out execution. -French v. Kingsmill, Sheriff, 30.

BANK OF UPPER CANADA.

Right of President to vote by Proxy at election of Bank Director. Quo Warranto. Mandamus. The president of the Bank of Upper Canada, not being an officer of the bank within the meaning of the 16th clause of the Bank Act, 6th Vic. ch. 27. is not prohibited from voting by proxy at the annual election of the bank directors.

Semble, that if the restriction had applied to the president, and he had nevertheless voted by proxy, the court, though they possibly might have interfered by issuing a quo warranto, would certainly not have directed, in the first instance, a mandamus for a new election .- R. v. Bank of Upper Canada, 338.

BARON AND FEME.

Deed executed by husband wife, Examination of wife. Ejectment. Grantee's possession. Interest of husband must pass.] Under our act 59 Geo. HI. ch. 3, a deed executed by husband and wife, but without an examination of the wife and a certificate thereof, is void; so

5 U. C. Q. B.

husband may maintain ejectment fore fatal to the holder's recovery during the coverture. though an indorsee for value, and

Semble, however, that under the more recent act I Wm. 4, ch. 2, the grantee's possession cannot be disturbed during the life time of the husband.

Semble, that care should be taken that the deed expressly convey the interest of the husband: for if the deed merely shows that he joins for conformity and to manifest his assent to his wife's parting with her estate, his interest will not pass.—Doe McDonald v. Twigg, 167.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Cancellation of original, by a renewal. Pleadings.] Where a note, when over-due, has been retired and settled by the substitution of a renewal note, the original note is cancelled, and cannot be put in cirulation again, even by the payee, who has taken up the renewal note out of his own funds.

JONES. J., dissentiente.

Semble, that under the pleas (as given in the statement of the case) the cancellation of the first note by the substitution of the second, could not be given in evidence.—Cuvillier et al. v. Fraser, 152.

Alteration made in Body of Pleadings.] A. the holder of a bill, sued B. the acceptor and C.the indorser as upon a bill "dated 1st June, 1847, payable three months after date" which when produced at the trial, appeared to have been in fact "dated November, 1841, and payable four months after date;" and to have been altered by erasure, and made to read as declared upon; Held, per Cur., that the alterations made in the bill were material to the contract, and there-

fore fatal to the holder's recovery though an indorsee for value, and not shewn to have been in any manner privy to the alteration; Held, also, that the alteration in the body of the bill as to the time of payment, was properly given in evidence, under the pleas of "did not accept," and "did not indorse." Quare? could the alteration in the date be given in evidence under these pleas.

DRAPER, J., dubitante on this point.
—Meredith v. Culver et al.

Pleadings.] The plaintiff sued upon a bill of exchange, drawn by A. on B., 1st of April, 1847, for £30 payable to his own order in ninety days, and accepted by B., payable at Bank of Montreal, He averred that A. endorsed the bill to C., and C. to him, the plaintiff. The defendant A., pleaded as to the £15, part of the sum claimed, that he made and delivered the bill to the plaintiff, who accepted the same from him, on the understanding that he was to collect it and apply £15 out of the proceeds to pay that amount due to the plaintiff, wherefore except as to £15 there was no consideration for making the bill of exchange; demurrer to plea; Held per Cur., plea bad.-Brown v. Garrett & Eccles, 243.

Liability of Endorsers (Defendants,) Plaintiff having compromised with the Maker as to a Portion of Note.] A made his note payable to B., who indorsed to the defendants, and the defendants to the plaintiff. The defendants (absconding debtors) were sued by the plaintiff, who averred in his declaration, a presentiment of the note to B. instead of to A. The note was made solely for the accommodation of the defendants, without any con-

plaintiff compromised with A., taking from him a portion of the note, and then discharging him, striking his name out of the note. The jury gave a verdict against the defendants for the balance of the note; Held, per Cur., verdict right.-Sifton v. Anderson et al., 305.

The following Instrument, a Promissory Note.] Held, per Gur., that the following instrument, "Yonge Street, 29th April, 1839. Seventeen months after date, I promise to pay to Mr. James Hogg or order, the sum of 50l., without interest, or three years and five months after date, with two years' interest, for value received," is a valid promissory note.-Hogg v. Marsh, 319.

Pleadings. Agreement pleaded. Demurrer.] Payee against maker of a note. The defendant pleaded, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, which had a certain time to run, the plaintiff agreed not to sue upon the note made by the defendant, until the other notes should become due.-Held per Cur., upon general demurrer, plea bad. - Durand v. Stevenson, 336.

Indorsement on Note. Right of Action affected thereby. Account stated.] Held per Cur., that the following instrument, "Ten days after date, we promise to pay M. Newhorn the sum of 85%. 15s., for value received;" upon which was endorsed, at the time the note was given, the following memorandum: "It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three years to run" could not be sued upon as a note between the original admits the signature of the agent,

sideration to A. to maker. The | parties, and could not be given in evidence under the count on an account stated,

> Ouære.-Would it be a note in the hands of an indorsee, who took it as a note for value?-Newhorn v. Lawrence, 359.

> Personal Liability on Bill. mission of Signature of Agent. Pleadings.] Held per Cur., upon the following bill and acceptance:-

> > " Montreal, July 9, 1847.

" 225l. 18s. 1d.

"Three months after date, pay to the order of Alexander Simpson, Esq., Cashier of the Bank of Montreal, two hundred and twenty-five pounds, eighteen shillings and one penny currency, for value received.

(Signed) "THE COAL BROOK DALE

COMPANY.

"Per PHILIP HOLLAND.

"To P. C. Delatre, Esq., President Niagara Dock and Harbour Company, Niagara, C. W."

The bill was accepted thus in writing :-

"Accepted, payable at the office of the Bank of Upper Canada, Niagara.

(Signed) "P. C. DELATRE,

President N. H. & D. Co." That in an action brought by the payee (the Montreal Bank) against the acceptor personally, the acceptor had rendered himself personally liable upon the bill.

Quare. - Suppose the had been suing the acceptor, would that have made a difference as to the acceptor's personal liability?

Where a bill of exchange is drawn by a person signing as agent of a company, upon a defendant who accepts the bill, the acceptance to draw the bill; it also precludes the setting up of any legal technical objections in regard to the composition or description of the company, or their ability to draw the bill.— The Bank of Montreal v. Delatre, 362.

Note payable to Bearer. Endorser thereon. How to be sued. Statute 3 Vic., ch. 8.] A party endorsing a note payable to A. B. or bearer, may be sued as indorser. He may also be sued jointly with the maker under our statute 3 Vic. ch. 8.—Ramsdell v. Telfer, 508.

Proof of, by subscribing Witness. Admission of.] The defendant was sued as maker of a note indorsed to the plaintiff. There was a subscribing witness to the note, who was not produced at the trial, and no objection was taken on that ground. But as the defendant had before the indorsement admitted to the plaintiff, that he had made the note, and induced the plaintiff to take it: Held, per Cur., that it was not necessary to prove the note by the subscribing witness, as the defendant could not be allowed to dispute his signature. - Perry v. Lawless, 514.

Notice of Non-payment. Delivery to a Servant of Indorser. quent Conduct of Indorser. Subse-Motion for a New Trial. Affidavits.] Delivering a notice of non-payment to an indorser, by leaving it with an out-door servant, cutting fire-wood, not known, and proved to have been an inmate in the indorser's family, is insufficient. It will be a question of fact, however, for the jury to determine, whether the subsequent conduct of the indorser shews him to have received the notice in due time.

And where the jury find for the plaintiff, though the judge's charge may be against the finding, the court will not set aside the verdict, if the indorser files no affidavit denying that he had notice.—Commercial Bank v. Weller, 543.

Pleadings. Argumentative Denial of Note. To an action on a note by the payee against three makers, one of the defendants pleaded, that at the time of the making of the said note, he the said defendant with the other two defendants were co-partners in the business, and that the other two defendants being indebted to the plaintiff before the partnership, made the note declared upon in the names of all the three defendants for the payment of the said debt, without the consent of him the defendant, of which the plaintiff had notice, &c., concluding with a verification; Held, per Cur., on demurrer to this plea, plea bad, as amounting to a denial of the making of the note, and therefore argumentative. Semble, that if the plea had concluded with a traverse of the making of the note by the defendant, it might have been supported .-Gourlay v. Gunn, 566.

Pleadings. De injuria.] Declaration on a note. Payee v. Maker. Plea (in effect), that plaintiff took the note on the understanding that he was not to enforce it until a certain event should occur; that the event which would have entitled him to enforce it never did occur; but on the contrary, that happened which by the agreement was to disable the plaintiff from ever making use of the note, and that the defendant was therefore excused from paying and his authority from the company

it. Replication, de injuria. Held, on demurrer to replication, replication good. Quære, is the plea, as stated in the report, good in form?—Bown v-Hawke, 5, 6.

Pleading. Duplicity. Argumentative Denial. To an action upon a note, by an endorser against the maker, who signed the note in his private capacity, a plea setting up a defence of want of consideration for the making of the note as regarded the defendant, together with notice and want of consideration on the part of the endorser, and also, setting up the further defence, that the defendant made the note as president, &c., of a company, to be binding only upon the company; and on the understanding with the payee, that there was to be no recourse upon the defendant, is bad for duplicity. Held also per Cur., that the plea is also bad as an argumentative denial of the making of the note, and as setting up a verbal understanding, contrary to what the maker's signature to the note would import.-Ewart v. Weller, 610.

Notice of Non-payment. Address of Notice to Endorser, " York Township" generally. Sufficiency of. Held, per Cur., that a notice of a nonpayment of a note, sent to an endorser, through the post-office, addressed to him in "York Township," in which he resided, was sufficient, there being no evidence as to whether there were one or more postoffices in that township, nor any proof that a letter for any other purpose would have been usually addressed in any other manner, or ought in the common course of things to have been directed to any certain postoffice in the township, or in any

other township near him.—Bank of Upper Canada v. Bloor, 619.

Notice of Non-Payment, Sufficiency of on a Sunday.] Held, per Cur., affirming the judgment of the court below, that the following notice of non-payment of a note—

"I.ondon, Nov. 22, 1846.
"Sir,—The promissory note of Peter Bowen, for 201., at three months from the 19th day of August, 1846, on which you are indorser, is due this day unpaid, I therefore give you notice, that as the holder of the said note, I look to you for payment thereof.

"Your most obedient servant,
"WARREN BLINN."

Given to the indorser of the following note to the indorsee—

"London, 14th August, 1846.
"Three months after date, for value received, I promise to pay to Thomas C. Dixon, or order, at the office of Warren Blinn, Esq., in London, the sum of twenty pounds currency.

"F. P. BOWEN."

Was a sufficient notice to bind the indorser, without stating that the note had been presented for payment or dishonoured. Held, also, that the notice being dated on Sunday (the note falling due on the Saturday, and the notice being delivered on the Monday), was no objection to the validity of the notice.—Blinn v. Dixon, 582.

Pleadings. Averments of express promise, or liability in declaration.] It is not necessary for a payee or an indorsee, in declaring upon a promissory note against the maker, to aver any express promise in addition to that which is set forth as contained in the note itself, neither is it necessary to aver any lia-

Woods, 572.

Recovery of Note on common count, money paid.] Where the plaintiff takes up a note which the defendant had given him, and which he was bound to pay at maturity, the plaintiff may recover against the defendant upon the common count, as for money paid to his use.-McNab v. Wagstaff, 588.

Pleadings. Note payable to maker's own order. Suit by Indorsee claiming by endorsement from the maker.] A. makes a promissory note payable to his own order. B. sues him as indorsee, claiming by indorsement of A., made subsequent to the note; Held, per Cur., that the declaration in that form was bad on special demurrer .-Brown v. Shaver, 621.

BOUGHT AND SOLD NOTES.

Bought and sold Notes, when to be treated as an actual sale.] Bought and sold notes, like the one in this action, may be treated as an actual sale, though the fact may or may not be, that the one party has not at the time a specific lot of the article in his possession, and actually set apart for the particular vendee.-Brunskill v. Chumasero et al. 474.

BOUNDARY LINE.

Held per Cur., that while two persons are in difference about their boundary, and shew by their conduct that they are uncertain about the true line, but acknowledge of each other to have it ascertained, and to hold according to it, either party may make a conveyance to a third person, which will enable the alience to hold according to the true boundary, though at the time of the

bility to pay the note. - Whitney v. his land occupied by the other, in consequence of the true line between them having been mistaken .--- Doe Beckett v. Nightingale, 518.

MACAULAY, J., dubitante.

BOND,

Indemnity Bond, Pleadings. The plea of "non damnificatus" to a bond, which is not an indemnity bond, is bad.

Quære: can the defendant, after treating the bond as an indemity bond by his plea, object to the plaintiff's right to recover on the insufficiency of the pleadings on the record ?-Mc-Donald v. May et al. 68.

Performance of Conditions in Pleadings.] Where the plaintiff had bound himself to advance money to A., upon certain conditions, and the defendant had in the same bond guaranteed the plaintiff the repayment of such advance; the plaintiff, in suing the defendant upon the bond for the non-fulfilment of his guarantee, should set out with certainty what the conditions were on which A. was to obtain the money from him (the plaintiff), as otherwise nocertain issue could be taken upon the question, whether A. had performed the condition or not, or whether the plaintiff had done what he agreed to do. viz., to advance the money on the conditions agreed upon; the simple averment, therefore, that A. had not kept the conditions, without stating what the conditions were, is bad. A plea, also, stating that the plaintiff had not kept all the conditions on his part, when it nowhere appeared what they were, is also bad. Where the plaintiff by his bond was either "to secure or advance" the money, conveyance there might be some of a plea stating that the plaintiff had

not "secured and advanced," is bad. | -Wright v. Benson, 249.

Conditions. Pleadings. District Council. Collector of Township.] To an action of debt on bond against a collector of a township and his sureties, for not paying over to the treasurer of the district, all moneys that he should collect in the year 1846, on or before the first Monday of December in that year, the defendants pleaded that by a certain by-law of the district council, passed in May, 1843, it was enacted that the collector should pay his monies to the treasurer quarterly, which he did; Held, per Cur., on demurrer to plea, plea bad, as being no answer to the condition of the bond. -Baby v. Drew, 556.

CA. RE.

Original issued from one District may be directed to sheriff of another.] An original ca. re. may under the 8th Vic. ch. 36. issue out of the office of the deputy clerk of the crown of one district, directed to the sheriff of another district.-McMann v. Patterson et al., 631.

Notice to appear on necessary.] The service of a copy of ca. re, will be set aside, unless a notice to appear thereon be written pursuant to the statute.

Quære? must this notice be written on the copy of the writ? may it not be written on a piece of paper attached to it?-McTiernan v. McChesney, 631.

CLERK OF THE CROWN AND PLEAS.

Gertificate of, under 10 and 11 Vic. ch. 15, to Sheriff to admit to limits.] Under the 10 and 11 Vic. ch. 15, sec. 5, the Court will not direct the Clerk of the Crown and Pleas to give the of his plea, "by statute."

certificate to the Sheriff to admit a prisoner to the limits, without the Clerk is first satisfied that notice of bail for that purpose has been given to the plaintiff in the action, so that he might, if he had so chosen, have excepted to them in due time before justification .-- Mills v. James, 216.

CLERGY RESERVES.

4 & 5 Vic. ch. 10, sec. 18.] The 18th clause of the Provincial Act, 4 & 5 Vic., ch. 100, does not apply to Clergy Reserves.-Byers v. Moore, 4. See also, Doe Weisenberger v. McGlennon, 138.

COGNOVIT.

See, under "Practice,"-Commercial Bank v. Brondgeest, 325; Loverty v. Patterson, 641.

COMMON COUNTS.

Plaintiff failing to recover on special agreement open, and executory cannot resort to.] Where a plaintiff seeks to recover upon a special agreement still open and executory, and fails from not having made a legal demand upon the defendant to do the work agreed upon, he cannot, after such failure, be allowed to recover upon the common counts. - Downs v. McNamara, 333.

Plaintiff taking up note, which defendant should have done, may recover on.] Where the plaintiff takes up a note which the defendant had given him, and which he was bound to pay at maturity, the plaintiff may recover against the defendant upon the common count, as for money paid to his use.-McNab v. Wagstaffe, 588.

CONSTABLE.

Necessity of inserting in the margin

of, in civil proceedings. Want of affidavit being annexed to a bailable process, how it might affect.] A defendant sued in trespass, for a false arrest, and intending to urge in his defence, that he arrested as a constable, and that the action against him was brought in a wrong county, will not be entitled to do so, if he has omitted to insert in the margin of his plea "by statute," unless the court can say, upon the facts proved at the close of the plaintiff's case, that the defendant was acting as a constable.

Semble: that a constable in a civil proceeding has no colour or pretence for acting without authority specially given by some process.

Quære.—Is an attachment of privilege within the 9th clause of the 2 Geo. IV? And Quære—Would this doubt, or the want of an affidavit being annexed to a bailable process, prevent the defendant, a constable, from having the benefit of the 21 Jac. I., on the point of venue?—Brown v. Shea, 141.

Arrest by, Affidavit of Debt. When may deliver Prisoner to Sheriff.] In an action against a constable for an escape on mesne process, a count in tort and a count in assumpsit cannot be joined. An arrest by a constable on mesne process directed to the sheriff, is not legal, by the act 2 Geo. IV. ch. I, sec. 9, unless the affidavit of debt be annexed to the process. Semble, that a constable may legally allow a debtor, whom he has arrested, to go at large, so long as he afterwards, and before the return of the writ, delivers him to the sheriff .-Ross et al. v. Webster, 570.

CONTRACT.

Ordnance Department.] A contract

made under seal by the Commissary General, acting on behalf of Her Majesty, her keirs and successors, does not bind the principal officers of Her Majesty's Ordnance,—Tully v. P. O. H. M. Ordnance, 6.

Foint Contract. Liability of Parties.] A. contracts with a company to make a highway; B. becomes security to the company for the fulfilment of A.'s contract; A. then employs C. to cut out for him certain timber at a stipulated price. while C. is engaged in cutting out the timber, fails in his contract with the company. B. the surety, upon A.'s failure, tells C. to go on with his work, and he will see him paid. Upon completing his job, C. sues A. and B. jointly; Held, per Cur., that under these facts, there was no joint contract by A. and B. with C.; but that A. was primarily liable on his contract, and B. secondarily liable as a guarantee.-Nicholls v. King and Garside, 324.

Liability on, whether personal or as representing a Corporation.] plaintiff sued the defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at Hamilton. The defence was, that the society, which is an incorporated body, was liable, and not the defendant personally. The learned judge, at the trial, left it to the jury to find upon the evidence, whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen, who undertook to superintend; in either of which events he held him to be personally liable; but the jury were told that if he contracted only as representing, or on behalf of the corporation, that then he would not be personally liable; Held, per Cur., on motion for a new trial, the verdict being for the plaintiff, that the ruling of the learned judge at the trial was correct.—Simpson v. Carr, 326.

CONVICTION.

For selling Spirituous Liquors by retail; first conviction defective, Justices may make and file a second.] per Cur., that the following conviction for selling spirituous liquors by retail contrary to law, "that A. B. of, &c., merchant and shop-keeper, did within the space of six calendar months now last past, in the year aforesaid, at, &c., sell and vend a certain quantity of spirituous liquors, in less quantity than one quart, to wit, one pint, &c., without license for that purpose previously obtained, contrary to the form of the statute in such case made and provided "-was bad in substance in leaving it doubtful under which of the statutes (40 Geo. III. sec. 3; 6 Wm. IV. sec. 2; 6 Geo. IV. ch. 4) and for what offence the conviction was made.

Semble, that after a first conviction has been returned to the quarter sessions and filed, the justices, if they think it defective, may make out and file a second.—Wilson v. Graybiel et al., 227.

CORONER.

Under a special writ of venire, not required to return a panel of thirty-six jurors.] The coroner under a special writ of venire is not required to return a panel of thirty-six jurors—the 36 Geo. III. ch. 2, and the general jury law being applicable only to the sheriff and not to the coroner.—Fraser v. Dickson, 231.

COSTS.

Full costs. 5 Will. IV.] A. at the assizes in Toronto, sues B. as one of the indorsers on two promissory notes, one for £27, and the other for f.76. A. recovers on the note for f.27, but having mislaid the note for £76, he enters a nolle prosequi as to that part of his claim; A. also brings another action in the District Court, of the Niagara District, against C. the maker, and D, another of the indorsers, upon the same note for £27; Held, per Cur., upon a motion to restrain the plaintiff, under the 5th Will. IV., from recovering more than the full costs of one suit, that the act did not apply.-Geddes v. Rogers, 1.

Where to an action quare clausum fregit, the defendant pleaded, "that the close was not the close of the plaintift," and the plaintiff had a verdict for 1s. damages; Held, per Cur., that the plaintiff, under the stat. 22, Car. 1, ch. 9, though he had not obtained from the judge at the trial, a certificate that the title to the land came in question, was, nevertheless, entitled to full costs.—Lake v. Briley, 307.

Promissory Note of Full costs. £25. made at Perth, discounted at Brockville. A note for £25 was made and endorsed at Perth, in the Bathurst District.but was discounted at Brockville, in the Johnstown District, by the agent of the plaintiffs the endorsers. The plaintiffs sued the defendants (the maker and endorser) in the Queen's Bench, laying the venue in 'the Johnstown District. Judgment by default and an order to compute was obtained; Held per Cur., that under these circumstances, the plaintiffs were entitled to Queen's Bench costs .-

320.

COVENANT.

Liquidated damages. Penalty.] Held, per Cur., upon the following clause at the end of an agreement, "and for the performance of this agreement each party binds himself to the other in the penalty of £50 liquidated damages, and not as a penalty, which f,50 shall be forfeited by him who fails to perform this agreement, and shall be recovered the one of the other in an action of debt after one month from this date, on default made by either party;" that the f 50 was a penalty, and not liquidated damages, and that the plaintiff was therefore right in bringing covenant upon the agreement, and not debt; Held, also, that upon the agreement (set out in the report) the covenantor, and not the covenantee, was the party to prepare the papers for the Bishop of Toronto to execute.-Henderson v. Nichols, 398.

See under "District Court," Billings v. Nichol, 622.

DEED, vide also TITLE.

Wife's Estate. Construction of. Husband.] Semble, that care should be taken that the deed expressly convey the interest of the husband, for if the deed merely shows that he joins for conformity and to manifest his assent to his wife's parting with her estate, his interest will not pass.

General and particular Description in.] Where land is described generally in a deed, as being part of lot No. 4, and the particular and specific description that is afterwards given, clearly shews it to embrace a part of lot No. 3, as well as lot No. 4, the specific, and not the general descrip-

Commercial Bank v. Kerr & Craig, tion, must be taken to govern .- Doe Murray v. Smith, 225.

> Bond for. Preparation of, under Bond. Tender.] Where by the terms of a bond, the obligor was to convey in fee simple to the obligee, at the expense of the obligee; Held, per Cur., that on this condition, it was incumbent on the obligor to prepare the deed, and to tender the delivery of it to the obligee on his paying the expenses thereon, and therefore, that a plea by the obligor to such a bond, that the obligee did not prepare or tender the deed or expenses, was bad.-McDonald v. Snitsinger, 312.

Erroneous description of lot in.] Where land is so particularly described in a deed by its local abutments, as to enable any one to find it with certainty, it is unnecessary further to state in what lot in the township the land lies. If, therefore, the land so described is stated to be part of lot 42, when it is in reality part of lot 45, the deed is nevertheless certain and good .- Doe Notman v. McDonald, 321.

Partition. Feme covert. Examination by Justice.] A deed of partition made by a feme coverte, tenant in common, will not be binding on her estate, unless there be endorsed on the deed a certificate of her examination and consent, &c., by a judge or justice, as required by our acts I Wm. IV. ch. 2, and 2 Vic. ch. 6 .-McKinnin v. Arnold, 604.

Execution of, under power of Attorney. Granting part of.] A. received from B. a power of attorney to sell lands. Under this power A. delivered to C. a deed professing to be made as follows: "Between A. by and under a certain power of attorney, bearing date, &c., by and from one B. of &c., yeoman of the first part, and C. of the other part." Throughout the deed A. the said party of the first part was made the grantor, and the deed was thus executed. By power of attorney bearing date 14th April, 1849.

(Signed) A. (L.S.) (Signed) C. (L.S.)

Held per Cur., that A. being the granting party in the deed, and not B., B.'s interest did not pass by the deed. Semble, that even if B., had been made the granting party, the deed would have been inoperative from its informal mode of execution.—Dacksteder v. Baird, 591.

As to plan forming part Miscalculation in the number of acres.] A., according to the statute 8 Geo. IV. ch. I, surrendered to his Majesty, in consideration of 6361. 5s. received by him "all parcel of land overflowed covered with water, being composed of part of lots 37, 38, 39, in the first concession of the township of Kingston, containing by admeasurement 462 acres more or less, and more particularly described in the plan thereof hereunto attached, to the intent that the said land and premies covered with water, shall forever hereafter be vested in and enjoyed by his majesty, his heirs and successors, free from all incumbrances."

There was annexed to the deed a plan verified by one Burke, the surveyor who made it, by a certificate signed by him on the face of the plan in these words, "I do hereby certify that the above diagram is drawn from actual survey, and in actual accordance with the deed held:

held by the proprietor, and that there are 462 acres and 16 rods permanently covered by the waters of the Rideau Canal." Across the land from one side to the other was drawn an irregular line, exhibiting on the one side (which was the front end of the lots) the 462 acres surrendered to the government as being covered by the overflowing of the canal, and on the other side or in rear of this line, 123½ acres, which is marked "land."

Afterwards A. conveyed to B. all those certain parcels of land "in the township of Kingston, and being the rear parts of lots 37, 38, and 39, as laid down on a certain plan drawn by Mr. Burke the surveyor, in the fifth concession of the township of Kingston, and by the said Burke stated to contain 123½ acres."

The land surrendered to the crown had been paid for to A. at a price per acre, assuming it to contain 462 acres according to Burke's survey; but it turned out afterwards that the plan did not correspond with the fact, the survey being extremely inaccurate, for that there was not as much land covered with water as the plan represented, by 141 acres.

Held per Cur., that the deed made to B. carried only such land (123½ acres) as upon the scale of measurement on which the plan was framed, formed the area in the irregular line drawn across the lots, without regard to the fact of what portion of the lots was actually covered with water, and that the whole 462 acres had, under the deed of surrrender, vested in the crown.

Robinson, C. J., dissentiente, who held:

rst: that the plan must be regarded as part of the deed, and read as part of the description in both the conveyances.

andly: that the deed to B., taken with the plan, shewed clearly, that what was meant by "the rear part" of the lots, to be conveyed to B. was all the land back of the line, which marked the rear or northern boundary of that before surrendered to the crown, for the use of the canal.

3rdly: that in order, therefore, to determine what could be held under this grant of the rear part, it was necessary first to decide what had passed to the crown by surrender.

4thly: that, by the surrender, the crown only acquired that portion of the land which was covered with water, both the deed and the plan showing that nothing more was intended to pass, and that the surveyor having laid it down inaccurately on his sketch, according to his scale, and having miscalculated the number of acres, was a mere falsa demonstratio, which could not overtule the more substantial part of the description.

5thly: that the effect of the first deed was to vest in the crown all the portion of the land overflowed by the canal, and that the second deed conveyed to B. all that lay in rear of the water mark.—Doe Gildersleeve v. Kennedy, 402.

DECK LOADING.

Loss of cargo loaded on deck. Liability of ship-owner.] Whether in case of loss of cargo loaded on deck, the ship-owner will be liable, depends on the usage prevailing in respect to deck loading in the particular navigation. — Paterson v. Black, 481.

DEMURRAGE.

What demurrage recoverable under common count for.] The count for demurrage can only authorize a recovery for a sum of money due on an express contract to pay demurrage eo nomine—not a recovery for demurrage for wrongfully detaining the vessel, when nothing had been specified about demurrage.—Brown v. Ross, 469.

DEMURRER.

To pleading.] See "Pleading."

DISTRESS.

Removal of property sold under.] The purchaser of a property sold for rent must remove the same from off the premises within a reasonable time after the sale. If property be sold on the 15th of February, and the purchaser enters to remove it from off the premises on the 26th March following, he will be liable as a trespasser.—Alway v. Anderson, 35.

DISTRICT COUNCIL.

Warden. Salary. By-Law. Mandamus. Interest.] Semble, that under the acts 4 & 5 Vic., ch. 10, and 9 Vic., ch. 40, the warden of a district council may be granted by the council a salary as warden.

Semble, also, that this salary, if granted, must be by a by-law regularly passed, and not by a vote or resolution merely.

Upon an application by two members of the municipal council of the district of Gore for a mandamus to the warden, commanding him to repay to the treasurer of the district a sum of money he had received from the council as a salary for his services as warden; Held, per Cur., that the mandamus must be refused, the parties applying having no particular

interest in the matter.-Regina v. District Council of Gore, 357.

Assessment rolls. Statute labour lists, by whom to be prepared and paid for.] Held, per Cur, that under the authority of 4th & 5th Vic., ch. 10 district councils may pass by-laws providing that the assessment rolls and statute labour lists, formerly prepared by the clerks of the peace, shall in future be prepared by the clerks of the district councils, and that they be remunerated therefor.

Semble, however, that the councils may, if they think proper, still allow these duties to be performed by the clerks of the peace, in which case they will be entitled to the compensation .- Baby v. Baby, 510.

Mandamus. Building Court House.] The court refused a rule nisi for a mandamus, at the instance of the Justices of the Huron District, to compel the Huron District Council to build a court house.- Justices of the District of Huron v. Huron District Council, 574.

DISTRICT COURT.

Practice and jurisdiction of. Attorney. Bill of Particulars.] Under the 8 Vic., ch. 13, sec. 51, a writ may go to the district court to try an issue in which an attorney is defendant.

Where the declaration claimed 75l. for work and labour, but the bill of particulars only 191., the case is brought within the limits of the act, and may be referred.-Martin v. Gwynne, 245.

Furisdiction of, over evidence given in Division Court.] The jury

| court gave judgment on insufficient evidence, nor whether the plaintiff abandoned the residue of a large demand, so as to give the court jurisdiction; where, therefore, this had been done, and the judge of the district court, on a motion in term, arrested the judgment, the court above confirmed his judgment,-Hynes v. Burrowes, 253.

Jurisdiction of, in matters of setoff.] Where there are open running accounts between plaintiff and defendant in the district! court, made up of divisible items, not exceeding in each 25%, the defendant can only recover by way of set-off, the difference between 251. and the amount due to the plaintiff. If the defendant, however, desires to recover more than will balance the plaintiff's demand, he must give notice of or plead a set-off to the 25l., and claim in his plea or notice to have the amount between the plaintift's demand and the 25%. allowed him.

McLean, J., dissentiente.-Being of opinion, that a defendant, upon a set-off, might recover a balance to any amount beyond the 25%,-the jurisdiction of the district court not being limited as to a defendant's setoff .-- Russell v. Conway, 256.

Bail, bond in. Where plaintiff in original action should sue. Where the Sheriff.] In an action upon a bail bond, given in a district court, the plaintiff, if the plaintiff in the original action, should sue in the district court; and if he sues in the court of Queen's bench, the defendant may take advantage of the error in one of three ways, -either by applying to the court to set aside the in a district court cannot try as an proceedings - or by pleading in issue of fact, whether the division abatement to the jurisdiction-or by

demurring generally to the declaration | from a pond or lake, and kept back -he cannot have a repleader.

Semble, that the sheriff, if suing on the bond, is not restricted to the district court of the district in which the bond was taken, but may sue in the court of Queen's Bench.-Hamilton v. Shears, 309.

, Jurisdiction of, in actions of cove. nant.] Held, per Cur., that under the District Council Act, 8 Vic. ch. 13, sec. 5, the district courts have jurisdiction in actions on covenants to pay a sum certain to 50%, as in other cases of contract, where the amount is ascertained by the signature of the party .-- Billings v. Nicolls, 622.

DOWER.

Reputation of marriage sufficient in.] Evidence of cohabitation and reputation of marriage will substantiate a claim of dower.-Phipps v. Moore, 16.

Covenant for further assurance. Action by covenantee for release of dow er during coverture. Tender of conveyance.] The right of dower which a woman has during coverture is not an interest, the release of which the covenantee can require, under the ordinary covenant for further assurance.

Semble, per Macaulay, J., that if the woman had survived her husband, an action would only lie upon an effectual conveyance to pass her estate having been tendered.-Hoyt v. Widderfield, 180.

EASEMENT.

Mill-dam. Waste Water. Absolute and qualified Easements.] A. at a time when no one else had a mill lower down the stream, made a

the water for the purpose of a mill, which he had erected below the dam. After A.'s dam and mill had been thus erected, B. built a mill lower down the stream, which for 20 years and more had been adequately supplied with water by the escape of water from A.'s dam. A. had in addition to his mill below his dam, a saw-mill below B.'s mill. B. had rarely to complain of the water being injuriously retained by A.'s dam, and made therefore no objections to A.'s obstruction of the water by his dam, for twenty years. After forty years and more had elapsed, A.'s saw-mill passed into other hands, and A.'s mill, from decay, stopped working. A. therefore having no object of his own in allowing the water any longer to escape from his dam, kept it penned back, and thus prevented B. from working his mill below. Upon this B. at once brought an action on the case against A. for obstructing the flow of water to his mill by the erection of his dam. A. pleaded an easement, and contended that as he had had the unrestricted control of the dam for twenty years, he might exercise the right, whenever he pleased, of preventing any water' escaping to B.'s mill; but, Held per Cur: that the only easement acquired by A., under these facts, was the qualified one of penning back the water for the purpose of his own mill, so as not to interfere with B.'s use of the waste water, as he had been enjoying it for the working of his (B.'s) mill, during the twenty years the dam had been erected by A., and acquiesced in by B. other words, that A. could not set up dam across the river, where it issued a more extended right than he had

consent, for twenty years.

Held, also: that the facts of B. having paid A. a sum of money for one year or more, to be allowed to enter upon A.'s land and let down the water to his (B.'s) mill, was no concession by B. of any exclusive right on the part of A. to penn back the water at his dam as he pleased. -Buell v. Read, 546.

Case, for diverting water from mills -- justification -- demurrer.] --A. sues B. in an action on the case for injury to his mill, by diverting the water of a stream at a point above. B. pleads in justification that A, had erected a dam which penned back the water and made it overflow on defendant's close, wherefore the defendant dug trenches into the stream to lead off the water, as he had a right to do.-Held, bad on demurrer .-Adamson v. McNab, 438.

EJECTMENT.

Collusive possession through tenants.] A. purchasing land at sheriff's sale, having reason to believe that he cannot get possession without legal proceedings against the execution debtor B. to avoid thiscontrives by collusion with C., B.'s tenant, to get into possession without the consent of B .- Held, per Cur.-in an action of ejectment brought by B. against A., that A., thus acquiring possession collusively through B.'s tenant, cannot set up any title in himself adverse to B. That before he can do this, however good his title may be, he must abandon the possession obtained through C. and bring his action against B .-Doe Miller v. Tiffany, 79.

Default. Agreement. Demand of possession. Notice.]-A. contracts to sell B. certain land for a sum of expressed in the deed. This was

actually been enjoying, with B.'s money, to be paid by annual instalments, and the defendant went into possession under B. upon some understanding or condition, not explained at the trial-default was made in the payments to A .- Held, per Cur., that A. could bring ejectment against the defendant without notice or demand of possession.-Doe Phillpotts v. Crouch, 453.

> ervice of declaration. Affidavit.] The affidavit of service of a declaration in ejectment, and notice upon the tenant, must shew the time when the declaration, &c., was served .-Doe Sherwood v. Roe, 319.

Tenancy. Affidavits. Possession contested.] The fact of the tenancy in an action of ejectment, cannot be contested by affidavits on a motion to set aside the service of the declaration and notice. Semble, that all that the tenant can do, is to ask the court to excuse him from confessing possession, and to require the plaintiff to prove it.—Doe dem. Vancott et al. v. Roe, 272.

Evidence to support the Plaintiff's Title. Necessity of going into his whole case at once.] The plaintiff in an action of ejectment, supported his title by proof of a deed given to him for the consideration of love and affection. The defendant proved his title by a subsequent deed from the same party, for a valuable consideration, and then endeavoured to impeach the first deed as being voluntary, and on that account void as against him, a bona fide purchaser for value. The plaintiff then offered to repel this evidence, by calling witnesses to prove that the first deed was given for a real consideration beyond what was

objected to by the defendant as going into a new case, and the learned judge rejected the evidence; but, Held per Cur., over-ruling the decision at nisi prius, that the evidence might have been received, the principle that a plaintiff should at once go into his whole case, not admitting of such a strict application in actions of ejectment.-Doe Lawrence v. Stalker, 346.

Wife of an attainted Traitor. Title in the Crown.] Semble, that the wife of an attainted traitor, remaining in possession of her husband's land, cannot defeat the recovery of a plaintiff in ejectment (the purchaser at sheriff's sale, in an action brought against the traitor upon a bond entered into before his attainder) by setting up, under the attainder, a title by forfeiture in the crown, which the crown had forborne to assert .- Doe Gillespie v. Wixon, 132.

Fee in Wife. Husband's demise. Marriage.] Though the wife owns the fee, the husband may sustain ejectment on his own demise alone, but on such a demise the lessor of the plaintiff must prove his marriage. -Doe Peterson v. Cronk, 135.

Setting up two independent defences.] A defendant in ejectment cannot first put the plaintiff to the proof of his title, and then, failing in his defence, secondly claim a right to notice or a demand, as if he were in possession under him. He must decide whether he will claim adversely to, or in privity with the title; he cannot do both .- Doe Maitland v. Dillabough, 214.

void for non-payment. Lessee's right to bring

a mill for a term of years to B. C. and D., who covenanted to pay the rent without default, otherwise the deed to be null and void, and A. covenanted that they should hold quiet possession of the premises during the term, provided that they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up, and afterwards obtained the key from one of the lessees, and A. distrained for rent such property as he found in the mill, which proved insufficient to pay the rent due; and refusing to give up the possession, the lessees brought ejectment; Held per Cur., that the lease being void by reason of the non-payment of the rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession, and that the lessors of the plaintiff could not recover. - Doe Somers v. Bullen, 369.

MACAULAY, J., dissentiente.

Execution debt as. Purchaser at Sheriff's sale. Possession. Title. In an action of ejectment by the purchaser at sheriff's sale, where the only question was, whether the defendant at the time of such sale, had possession under the execution debtor or not, the title of the execution debtor need not beshewn.

A. became purchaser at a sheriff's sale, and had a deed made to him by the sheriff, on the 29th of September, 1845. B. the execution debtor went into possession of the land sold, as devisee under his father's will, who died in 1835. B. on the 28th of September, 1842, leased the land to C. for three years, action of, after distress.] A. leased who enjoyed it for a year, when B.

the debtor having absconded from | have shewn, the court discharged the province, D., a brother of the debtor B., purchased the tenant's interest and went into possession. Upon the tenants quitting the place, he took from D. a written undertaking to save him harmless against B. B. in February, 1847, made a deed of the land to his brother D., who was then in possession, for the consideration expressed of 100l. This deed was registered in July. 1847. The sheriff's deed to A. was not registered. Held, per Cur., in an action of ejectment brought by A. against D. that upon these facts, D.'s possession at the time of the sheriff's sale was the possession of B, the execution debtor, through his tenant C., and that therefore A. was entitled to recover. Held, also, that the non-registry of the sheriff's deed had no effect upon the title, it not having been shewn that the prior registered deed from B. to D. had been given for a valuable consideration.-Doe Russell v. Hodgkiss. 348.

Compensation for Improvements. Act 59, Geo. III. ch. 14, sec. 12, Provincial Statute.] Under what circumstances the defendant in ejectment can claim compensation for his improvements, before he can be dispossessed under the judgment.-Doe Hare v. Potts, 692.

Possession. Paper Title. Setting aside Verdict.] Where a plaintiff in ejectment gave evidence of a former possession, and recovered upon that, without being put to the necessity of proving a paper title, and the defendant not having offered at the trial any evidence of title, applied to set aside the verdict upon affidavits alleging surprise, but not shewing what title he could given under it carry the possession

his application.- Doe Stewart v. Yager, 584.

See "Baron and Feme," Doe McDonald v. Twigg, 167.

EVIDENCE.

Dower. Reputation of Marriage. Cohabitation and reputation of marriage is sufficient to prove marriage in a case of Dower .- Phipps v. Moore.

Case for Seduction. Damages for. loss of Service. Proof of Father of Child. To sustain an action on the case for seduction, stating the debauching the plaintiff's daughter and servant, whereby she became pregnant, and laying consequential damages from loss of service, the plaintiff must prove the defendant to have been the father of the child; mere proof of seduction by the defendant will not be sufficient .-Kimball v. Smith, 32.

Commencement of actions, proved. Minute of clerk of crown or Deputy on writ.] The commencement of an action may be proved by the production of the writ of ca. re. The minutes of the clerk of the crown or his deputy, on the writ, marking the time of its issuing, is prima facie proof of the fact .- Upper v. Mc-Farland, et al., 101.

Letters of Administration.] Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator.—Beard, administrator, v. Ketchum, 114.

Necessity of, to prove actual possession by Patentee.] So long as there is no other person in possession claiming adversely to the tentee's title, the patent and titles

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by construction of law to the owner | of the fee. A visible actual possession by the owner, or by those claiming though the patent, need not be proved .- Doe Maclem v. Turnbull. 129.

Hearsay Evidence.] Ejectment. At the trial the plaintiffs put in evidence an exemplification of a patent dated 10th March, 1797, granting these lots in fee to Francis Crooks. It was then proved that Francis Crooks married in this province in 1794, and had two daughters; that one of the lessors was one of these daughters; the other lessor was a son of the other daughter. That Francis Crooks left this province for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and was at the time and when heard from at New York, in a very precarious state of health, on which account he had gone away; and it was heard in the following spring that he died in the West Indies; and it was so understood and believed in his family ever since. The defence was, that he died before the 10th March, 1797; and therefore that the patent dated on that day was void, and that a second patent issued in consequence thereof. And a patent, dated in 1801, granting these same lands to Abraham Auldjo in fee, was put in. It was next offered by the defendant to prove a petition from the widow of Francis Crooks to the Court of Probate, praying for letters of administration, and stating the day of his death, as evidence of his death on that day. The learned judge rejected it. The letters of administration were put in. It was next proposed

some members of the family of Francis Crook, to the executive government. praying that a new might patent issue in quence of Francis Crook's death before the 10th of March, 1797, as a declaration of that fact by relatives of the family. It does not appear who were the parties signing it. The learned judge rejected that also. The defendant then offered in evidence the memorial of Abraham Auldjo, praying that the new patent might issue to him, alleging that the patent of the 10th March, 1797, was issued subsequently to the death of Francis Crooks, and asking the grant for the benefit of Francis Crooks' creditors, of whom Abraham Auldjo was one, with consent of Francis Crooks' administratrix. This was also rejected by the learned judge. The defendant then called as a witness a surviving brother of Francis Crooks, who proved that the latter left this province in very bad health in the fall of 1796, being in fact considered in a desperate condition; that he wrote from New York, stating that he was better, and intended proceeding to the West Indies; and that in the following spring the witness was informed of The learned judge refused evidence of the day on which (as the witness heard) his death took place-or to receive evidence of the family reputation of the day of his death; or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been servant of Francis Crooks; or to prove the contents of certain papers (since lost) which the witness received from the servant, and alleged to be an inventory made of to put in a petition, signed by Francis Crooks' effects at the time of his death, and an account of the | fendant on the ground that he had sale of his effects after his death. And upon the evidence admitted, it was left to the jury to say whether Francis Crooks died before or after the 10th of March, 1797. If before, to find for the defendant; if after, for the plaintiffs. Held, per Cur. (Robinson, C. J., dissentiente) on motion for a new trial without costs, on the ground of misdirection and rejection of evidence, that the evidence rejected by the learned judge (Jones) at the trial was inadmissible; but that, as the nature and character of some parts of the evidence rejected were not known with sufficient certainty, the court would grant a new trial on payment of costs.

The Chief Justice was also of opinion, that even after the whole of the evidence objected to had been disallowed, the jury would have exercised a sound discretion in finding for the defendant upon the evidence which had been admitted. - Doe dem. Arnold et al. v. Auldjo, 171.

Hearsay Evidence. Pedigree Death of Relation.] Before a stranger can be allowed to give evidence of declaration as to pedigree, made by a relation of the family, there must be shewn 1st, the death of that relation; and secondly, the fact of his relationship to the family, which fact must be proved aliunde, and not by his own assertion .- Doe dem. Dunlop v. Servos, 284.

Admissibility of witness. Attorney. Payment of costs into court.] In an action upon a bond, the attorney for the plaintiff, who was the subscribing witness to the bond, was

become answerable for costs. To obviate this difficulty, the attorney paid into court a sufficient sum to cover the costs, and was then allowed to be examined. Held per Cur., on an application for a new trial, that the evidence of the attorney, after paying the money into court, was properly received. Cuvillier v. Thibodo, 328.

Incompetency of witness in ejectment.] Before a witness in ejectment should be rejected as incompetent, the precise connection of the witness with the premises claimed in the action, should be shown.-Doe Vernon v. Wetherall, 342.

Competency of witness when to be objected.] A plaintift allowing the defendant's witness to be examined and cross-examined, cannot afterwards object to his competency, upon grounds known to the plaintiff and the court, before the witness went into the box.

Semble.—That the case of Jacobs v. Layburn decides nothing more than this: That an objection to the competency of a witness is always in time, if made as soon as the interest is discovered.-Prescott v. Jarvis, 489

Promissory Note. Fraud. Declaration by the holders of a note, payable to A. B. or bearer, against the maker. Plea, that A. B. and others in collusion with him, obtained the note declared upon by fraud, &c. Upon this pleading, the Judge of the District Court refused to allow the defendant to prove that the original note, for which the note sued upon had been substituted, had been called to prove its execution. His fraudulently obtained from the testaevidence was objected to by the de- tor (the executor having given the

note sued upon), by a party who had no connection with the note in suit, and Held, per Cur., dismissing the appeal from the court below, that the evidence had been properly rejected.—Dougall v. Post, 554.

Memorial of Deed .- Letters. Thirty years old.] A memorial, more than thirty years old, of a lost deed, is good evidence, upon its bare production, without calling or accounting for the subscribing witnesses.

Semble.-That this principle extends to every written document more than thirty years old, even to letters.—Doe Maclem v. Turnbull, 130.

Seal of a Corporation, when sufficiently proved.] Where a witness stated that he has had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself, and from seeing the signature of the party whose name was attached to it, with whose handwriting he was acquainted; Held, per Cur., that this evidence, though not conclusive, was sufficient to go to a jury, to authenticate the seal .- Doe King's College v. Kennedy, 577.

Evidence supporting plea of Composition.] To an action on a note brought by an endorser against the maker, the defendant pleaded that while A. B. was the holder of the note, he compounded by a general agreement with him (A. B.) and all his other creditors, at 10s. in the f, which composition was afterwards paid to A. B. in satisfaction of the note and accepted, and that the note was endorsed to the plaintiff after it became due. Issue was taken on having been shewn to be dead, his

this plea by the replication de injuria. and the evidence at the trial was not a general agreement of the defendants, creditors, to accept a composition of 10s. as pleaded, but merely the fact that the defendant having become insolvent, had paid some of his creditors one rate in the pound in discharge of their debts, and to other creditors another rate. per Cur., that the evidence did not support the plea, and that a verdict on the leave reserved should be entered for the plaintiff.-Forster v. Bettes, 599.

Private Act of Parliament. Provincial Statute, 1 Wm. 4, Ch. 26, "vesting in a trustee certain lands as belonging to the estate of the late Laurent Q. St. George, has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve his trustee from the necessity of shewing title in the first instance.-Doe Baldwin v. Stone, 388.

Evidence under plea of not guilty by bailiff.] Under the plea of not guilty, the bailiff can only prove that he was not guilty of the negligence. He cannot give in evidence any special contract of service.-Ruttan v. Shea, 210.

Trespass. Sheriff, General issue. fustification.] The sheriff, sued in trespass for false imprisonment, in having arrested the defendant under a warrant issued by the justice of the peace sitting in quarter sessions, may give this justification in evidence under the plea of the general issue.-Fraser v. Dickson, 231.

Witnesses to Deed. Living witnesses to be accounted for.] A., B., and C. are witnesses to a deed. A.

handwriting is proved—the handwriting of B., who is also the lessor of the plaintiff in the action of ejectment, is also proved—D. the defendant in the action of ejectment, having proved B.'s handwriting, rests his proof of the deed there, without attempting to account in any way for C., the third witness.

Semble, per Jones, J.—That the deed, without accounting for the absence of the witness C., was not legally proved.—Doe McDonald v. Twiggs, 167.

Secondary evidence received. Objections afterwards as to search.] After secondary evidence of the contents of a document have been received, it is too late to object that a proper search for the document itself had not been made.—Doe Maclem v. Turnbull, 130.

What must be proved under a plea of surrender of action.] The mere allegation in the plea "of a surrender of a term of years to the defendant by the plaintiff," makes it incumbent on the defendant to prove an actual surrender made by the plaintiff, by deed or note in writing, sufficient under the third clause of the statute of frauds.—McNeil v. Train, 91.

EXECUTION.

Sale under Fi. Fa. of an interest in a lease.] A., the assignee of a certain leasehold property, makes an assignment to B. upon the understanding that he is to hold the property only as his agent, till his return from the United States. A. return and directs B. to assign the lease to C., which he does. D. having an execution against the goods of A. purchases at the sheriff's sale A.'s interest in the lease. Held per Cur.

in an action of ejectment, brought by D. to recover possession from C., that A. had no estate which could be sold by the sheriff—and that a verdict should be entered for the defendant C.—Doe Simpson v. Privat, 215.

Sale of lands under a spent Fi. Fa.] Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what had been commenced while it was in force—a sale of lands, therefore, under a spent writ of fi. fa. is void.—Doe Greenshields v. Garrow, 237.

Rent, charge, &c., not subject.] A rent charge issuing out of and chargeable upon a freehold estate, and granted to a person for his life, is not subject to be seized and sold as a chattel under a writ of fi. fa. against goods.—Smith v. Turnbull, 586.

EXECUTORS AND ADMINISTRATORS.

Pleadings. Promise of executors implied.] The plaintiff sues the defendants as executors of a testator, the endorser of a note which had not become due till after the decease of the testator-he avers due notice to the executors of the dishonour of the note, and then states, that by reason thereof they became liable to pay the amount of the note, and being so liable, they afterwards, as executors, promised to pay on request. The defendants plead, as to so much of the declaration as alleges that they promised to pay the plaintiffs, &c., that they did not promise, &c.; Held, per Cur., on demurrer to plea, plea bad, as raising an immaterial issue, the promise of the executors to pay being implied from

facts averred in the declaration, and not denied in the plea.—Masson v. Hill et al. Executors of Hill, 60.

Letbers of administration. Fromises to, as. Pleadings.] Upon the issue of ne unques administrator, the plaintiff, producing such letters of administration as he has pleaded, will be entitled to succeed. If the letters of administration do not give the plaintiff a right to sue by reason of anything extrinsic, such as the place of residence of the defendant. &c., the extrinsic fact must be pleaded specially. Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator.

The plaintiff as administrator sues the defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. The defendant pleads that he did not promise in manner and form, &c. Upon the trial it was proved by a witness, not shewn to have been the plaintiff's agent, or in any way privy to the cause of action, that he came from the United States in 1842, to speak to the defendant about these notes; that the defendant then said to him "get me the large note you speak of and show that to me, and I will pay the whole;" that he brought this note when he came the second time in 1844, and after much discussion the conversation ended in the defendant saying, that (the witness) must see a third party, to whom this defendant referred, intimating that he would not engage to pay until something had been ascertained through this reference: that he (the witness) made the reference to this third party, that | Company, 262.

nothing resulted from the interview, and that an action was therefore brought. Held, per Cur., upon these facts—Jones, J., dissentiente—that if the admissions to the witness could be construed into an absolute promise to pay—still being made before the plaintiff had received his letters of administration, they could not support the issue raised.

Quære.—Do the admissions in evidence support an absolute promise to pay—supposing them to have been made to the administrator himself? And if they do, does the fact of their being made to this witness instead of the administrator make any difference?—Beard, adm., v. Ketchum, 114-

FRAUDULENT CONVEYANCE.

Assignment to creditors. Execution upon confession cutting out assignment.] Under what circumstances assignment made by a debtor of his goods to one or more of his creditors for the benefit of themselves and others, may be upheld as against another creditor who has seized the same goods in execution upon a judgment confessed to him before the assignment.—Farish v. McKay, 461-

GAS COMPANY OF TORONTO.

Nuisance. Due care. Quære, can the Gas Company of the city of Toronto, under their act of incorporation, and their lease from the city of Toronto, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights, so long as they occasion no nuisance which they could by due care have avoided.—Watson v. Gas Company, 262.

GAOLER.

Liability of, where proceedings of Justice wholly void. Warrant of commitment when a justification. Delivery of copy of warrant by. When original warrant to be shewn.] Where the justices have a general jurisdiction over the subject matter, upon which they have issued a warrant of commitment to gaoler—though their proceedings are erroneous, the gaoler is not liable to an action secus, so as if proceedings be wholly void.

Quœre? Where a magistrate has, under the Summary Punishment act, committed a party unconditionally, when his commitment should have been conditional, upon his not paying a fine, can it be said, that he has so far acted within his jurisdiction, as to make his warrant a justification to the gaoler who obeyed it?

Semble. That under the 6th sec. of the act 24 Geo. 2, ch. 44, a copy of the warrant—if delivered by the gaoler without shewing the original, and no objection made, will be sufficient, Semble also, that if the original be demanded, its production will be good, though shewn after six days.—Fergusson v. Adam, 194.

GENERAL AVERAGE.

Stranding of vessel. Liability of owners of cargo to contribution for hiring steamer to haul her off,]
When a vessel was shewn to have been dangerously stranded on our lakes, by accident arising from the perils of navigation and without fault of the master, Held, per Cur., that the expense incurred by the master in hiring a steamer to haul her off, with a view to the safety of the vessel and cargo, and by which he was enabled to proceed to his destination, gave a claim for contribution against vanduson, 353.

the owners of the cargo, upon general average.—Grover v. Bullock, 297.

GUARANTEE.

Special, — set out. General, — Proved. Nonsuit for variance.] Where a plaintiff charged the defendant as upon a guarantee, to pay a certain judgment which he set out in specific terms; and he afterwards proved at the trial—not this special guarantee—but a guarantee extending to all claims—and he was nonsuited for a variance.—Held, per Cur., non-suit right.

Semble, however, that if the plaintiff had set out the guarantee as it really was, and had then averred the claim under the judgment, he would have shewn a claim applicable to the guarantee, and sustained his action—Sutherland vs. McCaskill, 316.

Continuing. Cannot be extended to purchase of goods by partners if given to one of partners while sole.] Held per Cur., upon the following guarantee:

"Messrs. A. & D. Shaw,

"Gentlemen, I have just received "a line from Mr. Lyman A. Ferris, "informing me that he wishes to "purchase goods from you. Being "acquainted with his circumstances, "and knowing him to be a man of "prudence and integrity, I do not "hesitate to be responsible to you "for £150 or £200 worth of goods, "should he require that amount." That it was not a continuing guaranty, and was not applicable to the purchase of goods by Ferris and a partner, but to the purchase of goods by Ferris alone.—Shaw vs. Vanduson, 353.

INTERPLEADER.

Sheriff. Attachment, The Sheriff, upon the plaintiff refusing to indemnify, applied to the court for an interpleader order, which was granted. Pending the interpleader issue, the plaintiff offered the indemnity, and the sheriff sold and paid the proceeds to the plaintiff. Held, per Cur., upon an application by the party in whose favour the interpleader issue had been found by the jury, that the sheriff was liable to an attachment for selling the goods in violation of the interpleader order, obtained at his instance, and for his own protection.-Henderson v. Wilde, 585.

HEIR AT LAW.

Deed by—third party in possession, claiming adversely.] A deed made by an heir at law, while a third party is in possession, claiming adversely, is void. The heir at law must gain the possession before he can convey.—Doe Peterson v. Cronk, 135.

JURY.

Coroner. Special writ of Venire. Panel.] The Coroner under a special writ of venire, is not required to return a panel of thirty six jurors, the 36 Geo. III, ch. 2, and the general jury law, being applicable only to the sheriff, and not to the Coroner.—Fraser v. Dickson, 231.

JOINT TRESPASSERS.

A Plaintiff discharging one of two, cannot bring an action against the other.] When a plaintiff by his own act, as by a reference and an award, has knowingly discharged one of two joint trespassers, he can-

not bring an action against the other--Adams v. Ham, 292.

KING'S COLLEGE.

The King's College cannot recover for tuition given in "Upper Canada College," before the passing of the statute of 7 Will, 4, ch. 16, (1837).

It is no objection to the right of "King's College" to sue for tuition given after the passing of the act 7 Wm. IV, ch. 16, in "Upper Canada College," that professor to "King's College" had not, during the time sued for, been appointed.—King's College v. Denison, 203.

LANDLORD AND TENANT.

A tenant cannot be allowed to put another in possession, or to connive at his slipping into possession, but must deliver up the premises to his own landlord. This principle is laid down in many cases, and it is very necessary to insist on it, for the protection of landlords. Per Robinson, C. J., in Doe Miller v. Tiffany, 87.

LEASE ..

Gonstruction of Lease. ration of term: Entry of Lessee.] Where the lessee covenanted to pay the yearly rent, and there was a condition in the lease, "that if the tenant should do or omit anything in breach or non-performance of any of his covenants," then it should be lawful for the landlord to re-enter; Held, per Cur., that the effect of the non-payment of rent upon such a demise would be to make it, not void ipso facto, but only void upon proper proceedings being taken for that purpose, and consequently, that until such proceedings were taken,

the term would subsist in the tenant, and the landlord could not maintain his title in ejectment. Held also, that it would not be necessary for the defendant in the action of ejectment to shew that the lessee actually entered under his lease, for until some one else be shewn in possession holding out the lessee, he must be regarded as seised of the term.—Doe King's College v. Kennedy, 577.

Forfeiture of, by 1 enant acknow-ledging title in another than in Landlord.] A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by record, that the fee is in another than in his landlord.—Doe Daniels v. Weese.

LIEN.

On Ship or Freight for wages or disbursements on account of Ship.] The master of a vessel has no claim or right against the owners, to detain the ship or freight for wages or any disbursements made by him on account of the ship.—Land v. Malden, 309.

LIMITATIONS (STATUTE OF.)

Open account. Later Items.] Quære. When can an account be considered an open unsettled account, so as to defeat the opetion of the statute of Limitations, by the later items in the account drawing the others with them?—Hamilton, administrator of Hamilton v. Mathews, 148.

Running against the Realty Mortgagee.] A patent was granted to A. of part of lot No. 4, and to B. of part of lot No. 5. More than 40 years ago, a division fence had been run between what was then supposed the boundary line of lots 4 and 5, according to which the proprietors of

the two lots had ever since respectively occupied. C., (the defendant in this ejectment), holding under B.'s patent, claimed a part of Lot 4, not as embraced in the patent, but as being actually possessed by him and others before him in the title of B., as part of Lot 5, and so considered both by the proprietors of 4 and 5, until very recently. D. (the Lessee of the Plaintiff), claiming under A.'s patent, brought his action against C., to recover part of lot 4, notwithstanding C.'s possession of the part claimed for 40 years, hoping to do away with the effect of the statute of Limitations by proof of the following facts: A.'s patent was issued in 1796. A, in Feb., 1842, mortgaged in fee to F., in 1829 the heir of F. brought ejectment against A., the mortgagor, who had remained in possession ever since the mortgage of 1802, and recovered. Nothing was shewn to have been actually done by any of the parties claiming through A., to disturb D,'s possession under the old division line. But, Held, per Cur., that the statute of Limitations had commenced to run against A. from the time of B.'s possession of the land in dispute under the old division line-that neither the mortgage given by A., nor the ejectment brought against him, had any effect upon the statute-and that therefore C.'s title (the defendant in this suit) under the possession of B. must prevail .- Doe dem. Dunlop v. Servos, 285.

Later items. Quarter's tuition. Independent payments. The principle that the later items of an account draw the others after them, and thus save all from the operation of the Statute of Limitations, does not apply, where quarterly payments

(e. g. for rent or tuition) are made and received as for a late specific and independent quarter, due at the time of payment, unmixed with items for any earlier quarter-the presumption in such a case is-unless the contrary be shewn to be the factthat the earlier quarters have been all paid and satisfied .- King's College v. McDougall, 315.

Operation of the 4 Wm. IV. ch. 1. as to realty. Commencement of the twenty years. Tenancy at will.] in 1817 makes an agreement with B. to purchase land, and is let into possession. B. dies before the passing of the Provincial Act, 4 Wm. IV., ch. I. C, the son of A. makes a bargain with D, the husband of the lessor of the plaintiff, to whom B. had demised the land, and fails in his payments, upon which an action of ejectment is brought to dispossess him, and is discontinued at his request in 1834; after this, the lessor of the plaintiff enters upon the land as owner, and being satisfied with the promises of payment made by the defendant, consents to her remaining for the present. The defendant makes no payments, and the lessor of the plaintiff brings her action of ejectment. Held, per Cur., under these facts, that A. became tenant at will to B. in 1817-That upon B,'s death, this tenancy at will was determined. That, that relation being at an end before the act 4 Wm. IV., ch. 1, was passed, the time which elapsed under such circumstances was not 'to be taken into account as part of the twenty years necessary to make a title by possession-that the action of ejectment brought in 1834, while it determined the tenancy at will, gave no new starting point, and had Held, per Cur., that the issue was

no retrospective operation. That the lessor of the plaintiff, by her consenting to the defendant's remaining on the land after the interview of 1843, revived the tenancy at will. And that as twenty years had not elapsed since that period, the lessor of the plaintiff was entitled to recover .- Doe Kingsbury v. Stewart, 108.

Admission of a debt, to take case out of. Account stated.] Held, per Cur. -That a conversation, in which the defendant "admitted that the plaintiff had a judgment against him, that he (defendant) had then no means of paying it, but that if they would be reasonable, he thought his friend could assist him, adding that he was entitled to some credits which the plaintiffs had not allowed him, and that if they would agree to accept land, he thought he could manage to pay them in that way frooo .- coupled with a letter, in which the defendant proposed to the plaintift to make over to them, for their claims against him, about 6000 acres of land," was a sufficient admission of a debt of £1000, under the account stated, to take the case out of the Statute of Limitations. -Russell v. Crysler, 484.

Pleadings. Immaterial issue. To a plea of the Statute of Limitations, the plaintiff replied, that when the cause of action occurred, he was in foreign parts, &c., and did not return to this Province till 1st July, 1846. The defendant rejoined that the plaintiff did not on the day named, or at any time, return to Upper Canada. Upon this the defendant proved that the plaintiff was not at any time in this Province, and asked to non-suit the plaintiff, but

immaterial, and the defendant not ties have in terms agreed that the sum entitled to a non-suit.—Crosby v. Collins, 545.

Division Fence. From what land through an erroneous survey, a party may be dispossessed under the Statute.] Where A. had improved on the front of his lot, and laid a division fence between himself and his neighour, so far as his improvements extended, which fence was found, upon a correct survey, to enclose part of the adjacent lots; Held, per Cur., that though the Statute of Limitations might bar the owner of the adjacent lot from regaining possession of the portion of his land which he had suffered his neighbour to enclose for more than twenty years, yet that would not affect the right of the latter to any other portion of his land not actually enclosed, as he could not be held to be constructively dispossessed of that portion of his lot which the erroneous fence if protracted would embrace. - Doe Beckett v. Nightingale, 518.

LIQUIDATED DAMAGES.

Penalty - Liquidated damages-Where the plaintiff in an action of debt on an agreement, lays his breach in such a manner as to make it uncertain whether he is not claiming his damages in the shape of liquidated damages, by reason of a failure in some very minute particular of agreement-as if, for instance, the breach complained of was, that the defendant did not by the 1st of September clear off all the standing timber; nor did he fence the said land-the court will not look upon the sum mentioned in the agreement as anything but a penalty-though the parties may have agreed to call it liquidated damages -and semble, even though the par-

named should be regarded as liquidated damages, and not as a penalty.

Where a certain sum is claimed by way of liquidated damages in an action of debt, for the non-performance of an agreement, and the court are of opinion that the sum mentioned in the agreement is in the nature of a penalty, and not of liquidated damages; Held, per Cur., that the statute 8 & 9 Will. III. ch. 11, will, when such an opinion is pronounced by the court, restrict the plaintiff from recovering more damages than he has received by reason of the breach; and that a demurrer, therefore, to the declaration would be bad.-Ainslie v. Chapman, 313.

MAGISTRATES.

Summary conviction for repressing riots at elections, must be tried by a Jury. Warrant of, under Summary Punishment Act.] Under the statute for repressing riots at elections, no power is given to magistrates to convict summarily. The offenders must be tried by a jury.

Under the Summary Punishment act, magistrates cannot issue their warrant to imprison absolutely for so many days, but only to imprison for so many days unless the fine and costs be sooner paid.-Fergusson vs. Adams, 194.

MANDAMUS.

Quashing of mandamus nisi, before the return is filed.] A mandamus nisi issued upon a rule obtained for that purpose, must be consistent with and authorised by the rule, otherwise it may be quashed, on motion, before the return to mandamus nisi is filed. -Regina vs. McLean, 473.

See the Queen vs. the Bank of Upper Canada, 338. Under "Bank of Upper Canada."

MEMORIALS.

More than thirty years old prove themselves.] A memorial more than thirty years old of a lost deed is good evidence upon its bare production, without calling or accounting for the subscribing witnesses. Semble: That this principle extends to any written document more than thirty years old, even to letters.— Doe Maclem vs. Turnbull, 129.

MORTGAGE,

Statute 21, Jac. 1. Possession of Mortgagor. Dissessin. Non-payment of interest. Effect upon Mortgagor. Under the old statute of Limitations, 21 Jac. 1, the possession of the mortgagor, when not adverse, would not bar the mortgagee.

The mortgagor being in possession at the time of a conveyance in fee by the mortgagee, is no objection to the conveyance. The doctrine of disseisin not applying as between mortgagor and mortgagee.

Where interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently, that the mortgagee has no subsisting title.

—Doe dem. Dunlop vs. McNab, 289.

Statute of Limitations. As between mortgagor and mortgagee.] Where a mortgagee has neither taken possession of the land mortgaged, after default—nor received interest upon the mortgage money within twenty years—the title is in the mortgagor—and the mortgagee, if suing in ejectment a third party in possession, may be non-suited.—Doe McLean v. Fish, 295.

NAVIGATION.

General average. Stranding of vessel. Expense of steamer to haul her off. Liability of owners of cargo to contribution.] Where a vessel was shewn to have been dangerously stranded on our lakes, by accident arising from the perils of navigation, and without fault of the master: Held, per Cur., that the expense incurred by the master in hiring a steamer to haul her off, with a view to the safety of the vessel and cargo-and by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo, upon a general average. -Grover v. Bullock, 297.

Demurrage. Right to recover on common Gount.] The count for demurrage can only authorise a recovery for a sum of money due on an express contract to pay demurrage eo nomine—not a recovery for demurrage for wrongfully detaining the vessel, when nothing had been specified about demurrage.—Brown v. Ross, 469.

Deck loading. Liability of Shipowner.] Whether in case of loss of cargo loaded on deck, the shipowner will be liable—depends on the usage prevailing in respect to deck-loading in the particular navigation.—Patterson v. Black, 481.

Steamboat not towing as by contract, owing to ice. No defence.] Semble.—That it is no defence to an action against the commander of a steamboat, for not towing, &c., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice.—Dorland v. Bonter, 583.

Master of vessel. Right to detain ship or freight for wages, &-c.] The master of a vessel has no claim or right against the owners to detain the ship or freight for wages, or any disbursements made by him on account of the ship.—Land v. Malden, 300.

NEW TRIAL,

Verdict for defendant set aside, the plaintiff being entitled under the evidence at all events to something.] Where to an action brought by the principal against the sureties of a clerk, for embezzlement, &c., the sureties pleaded that the principal was damnified of his own wrong, in allowing the clerk to remain in his office after he had become aware of his fraud; Held, per Cur., that though the fraud of the clerk was known to the principal long before he dismissed him from his employment, still that, as this knowledge could only apply to that portion of the monies taken by the clerk after the principal had been made aware of his conduct, the plaintiff should have had a verdict for something, and that the verdict for the defendants (the sureties) should be set aside.-McDonald v. May et al., 68.

Jury to look at the whole acts and complexion of the case before them.] A new trial will not be granted because the jury find for the defendant in the absence of any direct evidence to contradict an unimpeached witness for the plaintiff. The jury are to form the judgment upon the whole facts and complexion of the case before them.—Lane et al. v. Jarvis, 127.

Tort. Damages small.] In actions of tort, where the defendant has had a verdict, and the damages are but

small, it is always with reluctance that the court will grant a new trial; they will only do so where the ordinary rights of property seem to have been lost sight of.—Sherwood v. Gibson, 205.

A disputed item of plaintiff's demand improperly disallowed by jury, though plaintiff has a verdict for something.] Where a disputed item, forming one distinct head of the plaintiff's demand, has been improperly disallowed by the jury, the court will grant a new trial, though the plaintiff has a verdict for something; the principle upon which the courts refuse a new trial to the plaintiff for smallness of damages, not being held to apply.—Maddock v. Glass, 229.

New Trial in Ejectment. Evidence.] The court will not grant a new trial in ejectment, on the ground of the very unsatisfactory nature of the evidence upon which the jury decided, when it appears clearly to the court, that neither the plaintiff nor the defendant will take the trouble to offer to the jury such conclusive evidence upon the disputed fact, as is easily within their reach to produce.

—Doe McWilliams v. Wheeler, 238.

New Trial. Trespass. Verdict for defendant. Trespass proved.] Where A. having been tried for feloniously shooting at B. and acquitted, was afterwards sued in trespass for the same act, and the jury gave a verdict for the defendant, though the trespass was proved; the court under the circumstances declined granting a new trial.— Day v. Hagerman, 451.

Verdict Against Evidence.] Where a verdict was given for the defendant, as it appeared to the court, mani-

festly against evidence, and in sup- it is unnecessary for the lessor of the port of an assignment impeached as plaintiff, his original landlord, to fraudulent; the court gave a new trial on payment of costs.-Doe Wilks v. Massecar, 455.

Attorney mistaking place of cause on the docket.] New trial granted under particular circumstances. where the defendant's attorney mistook the place of the cause on the docket, and lost in consequence an opportunity of making a defence.-Dove v. Dalby, 457.

Undefended cause. Defendant's Counsel absent from illness.] court refused to set aside a verdict in an undefended cause, on an affidavit that the defendant's counsel was absent from illness, no attorney appearing at the trial to attend to the cause, and no application being made to put it off. -Gunn v. Van Allen, 513.

Offer of defendant's Counsel made at trial, subsequently rejected by defendant. Ground for. Costs. Where an offer was made by the defendant's counsel at the trial, and which it was said was to be carried into effect without reference to the verdict, and the jury being influenced by this statement, gave a less amount of damages than they might otherwise have done; the court, upon the refusal of the defendant to sanction the offer of his counsel, set aside the verdict, but with costs to abide the event, as no wilful intention to mislead the jury was imputed to the statement.-Watson v. Gas Light Company, 244.

NOTICE.

Notice to quit. Tenant taking a Lease from a stranger.] a tenant takes a lease from a stranger, and undertakes to pay him rent,

serve him with a notice to quit, or a demand of possession.-Doe Daniels v. Weese, 589.

Notice to Execution Creditor. Bankruptcy. Notice of Insolvency.] A notice in general terms to the execution creditor before the sheriff could have levied under his execution, of the debtor having committed an act of bankruptcy, to protect the debtor's property for the benefit of all the creditors.

Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of filing, provided a commission shall issue upon it within two months, and provided that the execution creditor, or his attorney, was aware of the fact before suing out execution .- French v. Kingsmill, 30.

Of trial, left at an office of an Attorney.] Leaving a notice of trial at an office of an attorney is not a service, unless it is sworn to have been given to some person there.-Gas Company v. Kissock, 542.

Notice by plaintiff's attorney to defendant. Costs.] If after notice by the plaintiff's attorney to the defendant, a bona fide settlement,or if without notice a collusive settlement be made by a defendant with a plaintiff, this court, in the exercise of its equitable jurisdiction will interfere to prevent the attorney from being unjustly deprived of his costs. -Langle v. Fetterley, 628.

Of action. To Magistrates. Sufficiency of.] Held per Cur., that the following notice of action-" And also, for that you, on the day and year aforesaid, with force and arms,

&c., and at the township of Thorold, did cause the horse upon which the said Joseph Upper was then riding to be seized, taken and led away, and the said Joseph Upper to be obliged to dismount and give up the said horse, and converted and disposed of the said horse to your own use; and also, for that you caused the saddle, and bridle and halter, which were then on the said horse to be seized, taken, and carried away. and to be converted and disposed of to your own use, and other wrongs to the said Joseph Upper then and there did, to the great damage of the said Joseph Upper of £100, and against the peace, &c."-was sufficient to enable the plaintiff to recover from the magistrates the value of the horse, as being the property of the plaintiff. Robinson, C.J., dissentiente, as to the sufficiency of the notice to sustain the verdict for the value of the horse.-Upper v. McFarland et al.. 101.

ORDNANCE DEPARTMENT.

The plaintiffs tendered for the construction of a lake wall in front of the barracks above Toronto, on the shore of lake Ontario, and their tender being accepted by the Commissariat officer at Toronto, an agreement was executed between the plaintiffs of the one part, and "Assistant-Commissary-General Thompson, acting on behalf of her Majesty, her heirs and successors," of the other part; whereby the plaintiffs engaged to execute the work according to their tender, and in conformity with the plans and specifications in the commissariat office, to which all the parties annexed their signatures, "preparatory to their being lodged with the Royal Engineer depart- father and son (defendants), the jury

ment for the guidance of all concerned." And it was stated in this contract, that the "plaintiffs should be entitled to receive from her Majesty's government, for the performance of the said works to the satisfaction of the Royal Engineer Department, the sum of £2786 8s. IId. currency, to be paid to them by the Ordnance Department by draft on the military chest, payable in bank notes or specie, at the option of the Commissariat Department.

The plaintiffs under this contract, upon the authority of the provincial act, 7 Vic., ch. 11, sued the principal officers of Her Majesty's Ordnance on the common counts for certain extra work. Held, per Cur., that this was an agreement between the plaintiffs and the Commissariat Department, and that therefore the plaintiffs had no right of action under the statute against these defendants.

Quære.-Suppose the contract had been clearly made between the plaintiffs and the Ordnance Department, could the plaintiffs have recovered against the defendants under the 30th clause of the provincial act, 7 Vic. ch. 11? Can the provincial parliament constitutionally give a right of action against the Board of Ordnance, a military department of the Imperial Government?

Quære. - Does the 30th clause, assuming it to be constitutional, give a right of action against the Ordnance Department upon an implied as well as upon an express contract.

PARTNERSHIP.

Inference of Partnership. Between Father and Son.] Where-upon the question of a partnership between

found for the plaintiff upon the by B. that C. paid A.'s son upon the following evidence:-That the son, a young unmarried man, lived with his father-was in general, occupied with his business, carrying beer to his customers, receiving money and making payments for him, &c., and had furnished part of the money on which his father built his brewery. Held, per Cur., that this evidence laid no ground upon which a partnership between father and son could be inferred-and that the defendants were entitled to a new trial on payment of costs.—Sculthorpe v. Bates, 318.

Payments made by a party to whom the partnership and the individual partners were in debt. How to be appropriated. A. and B. partners, agree to sell to C. 500 barrels of flour at so much per barrel, to be paid per hundred barrels, after the delivery and upon the production of the wharfinger's receipt. The son of A. (one of the partners) came to C. with the wharfinger's receipt for one hundred barrels; C. gave him a check for the amount due, in favour of the firm, and took his receipt. As the son was leaving C.'s store, a clerk of C.'s reminded him that a private note of A.'s to C. for f.40 was then due and unpaid. A.'s son with the proceeds of C.'s check took up his note B. the other partner in of £40. consequence of this application of the money of the firm by A. refused to send C. any more flour till the f.40 was made good to him. C. then sued A, and B., and recovered, and Held, per Cur., on a motion for a new trial, that the payment to A.'s son under the circumstances, was such a payment to the partnership as acquitted C. upon the whole sum paid. Semble. That if it could be shewn diction of District Court.]

previous understanding that A.'s private debt was to be retained out of the check given to the firm, the son's receipt would not have discharged C. from repayment of the £40 to the firm.-Brunskill v. Chumasero & Keating, 474.

Partnership. Failure of considera-Rescision of contract. Money had and received.] Held, per Cur. that under all the circumstances of this case (which are too long and special to repeat in the digest) the plaintiff could not bring an action for money had and received, to recover back the money mentioned in the defendant's receipt marked B.

Robinson, C. J., dissentiente.-Kay v. Cameron, 530.

PATENT.

Particularity of Notice. Of objections In an action by a patentee against a defendant, for an infringement of his patent, upon an order being made by a judge in chambers, that the defendant should deliver to the plaintiff particulars of any objections on which he intended to rely in support of his plea-that plea being, that the invention was not new, but had been wholly and in part practised, used and vended in Great Britain, &c., before the grant of the patent; Held, per Cur., that a notice delivered by the defendant to the plaintiff, that he intended to object at the trial to the patent altogether, as being granted for what was not a new invention, was sufficiently particular, and a compliance with the order.-Mills v. Scott, 360.

PARTICULARS.

Furis-Declaration. Particulars. Where

work and labour, but the bill of particulars only 191., the case is brought within the limits of the act, and may be referred .- Martin v. Gwynne, 245.

PLEADING.

See 'ARBITRATION-EXECUTORS-BOND-SET-OFF-SHERIFF-STA-TUTE OF LIMITATIONS-BILLS AND NOTES.

Non-assumpsit to a Bill. cutors.] The new rule of Court, making the plea of non-assumpsit to a bill or note, bad-is confined to cases where the action is between the parties to the bill or note; it does not extend to executors, &c .- Masson v. Hill et al., 60.

Mistake in demurrer to right plea. Amendment.] When the defendant, instead of demurring to the plaintiff's replication to his second plea, as he intended, demurred to his first plea, so that upon the second plea no issue was joined, the court set aside the verdict, and allowed both parties to amend their pleading.-Perry v. Grover, 468.

Private Act of Parliament. Misrecital, Demurrer to declaration against Executors.] Semble, that the misrecital of the title of a private act of parliament is no ground of demurrer.

In the concluding part of a declaration against executors, it was averred, "therefore an action hath "accrued to the plaintiff, to demand "and have of and from the defend-"ants executors aforesaid, &c." This was demurred to on the ground. that the averment should have been "to demand and have of and from

the declaration claimed 75l. for Held per Cur. - declaration good. Ferrie v. Jones, 504.

> Declaration on Note, Demurrer. Christian Names not set out in full. Damages.] Declaration, Payee against the maker of a note for 501.; dated the 24th December, 1844, and payable three months after date. Plea as to 24l. 14s. 3d. parcel, &c., accord and satisfaction by the defendant accepting an order on the 6th of March, 1847, in favour of J. C. Spragg, as required by the plaintiff, and as to the residue-setoff; Held, per Cur., on demurrer to plea, plea bad, 1st, in leaving unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the period of two years and more, which had elapsed between the day when the note became due, and the time of giving the order; and secondly, in not giving at length the Christian names of J. C. Spragg, stating that he was described in the order as J. C. Spragg.-Playter v. Turner, 555.

Indemnity bond. Plea of "non-The damnificatus." Plea of "non-damnificatus" to a bond which is not an indemnity bond, is bad - Quære? - can the defendant. after treating the bond as an indemnity bond by his plea, object to the plaintiff's right to recover on the insufficiency of the pleadings on the record?-McDonald v. May et al., 68.

Case, for a nuisance. Plea applying defence to time of plea pleaded. Demurrer.] In an action against a gas company for nuisance-a plea of justification, containing the averment that they are now managing their works carefully, and that the "the defendants as executors." vapours complained of unavoidably

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arise, is bad—as applying the defence to the time of pleading the plea, and not to the time of action brought. Watson v. Gas Company, 262.

Nonjoinder pleaded in abatement to a new assignment. Interlocutory judgment signed.] A. sues B. in assumpsit, upon the common money count for money paid-B. pleads that he made the promise in the declaration mentioned jointly with one C., and that C. made a deed in fee simple of certain land, which A. accepted in satisfaction of the said debt,-A. replies by new assigning that the money sued for is a different sum of money from that mentioned in the plea; B. rejoins by pleading in abatement the nonjoinder of C .-A. treats the rejoinder as a nullity, and signs interlocutory judgment .-Held, per Cur,-interlocutory judgment well signed—the plea in abatement being too late and a nullity .-Eberts v. Larned, 264.

What a charging in the Declaration with committing a Trespass.] A person who is charged in the declaration with causing another to be imprisoned, laying the act with force and arms, is charged with committing a trespass.—Fergusson v. Adams, 194.

Dower, intendment as to Wife.] Where the declaration alleges that A., wife of B., "having a lawful right to an estate in dower," refused with B. to execute a release, it will be intended, in the absence of any further averment, that the release was required from A. as the wife of B., and not as the wife of a former husband whom she had survived.—Hoyt v. Widderfield, 180.

Nuisance. General Terms.]

Semble, that a declaration would be good, charging in general terms the defendant with causing offensive vapours to arise, &c., without assigning the particular cause of the vapours. Were it, however, a good ground of special demurrer, the defect would be cured by the plea undertaking to describe the causes, &c., and to justify them. Watson v. Gas Company, 362.

School Trustees, their personal liability.] The plaintiff charged the defendants upon a special agreement, stated to have been made by them as trustees, to furnish with fuel, when required, the plaintiff, a school teacher, under the act, 9 Vic. ch. 20. To this declaration the defendants demurred on two ground: 1st, because no request, with time and place, had been laid in the declaration to furnish fuel; 2ndly, because the defendants, having made the agreement stated in the declaration in their corporate capacity, were not liable as individuals, but had been so charged in the declaration: Held per Cur., declaration bad upon both grounds of demurrer .- Anderson v. Vansittart 335.

Particular Damages. Averment of Notice of such Damages before Action brought.] Quære.—Where a plaintiff, upon an alleged breach of an agreement, seeks to recover compensation, not in the shape of general damages to be left to the discretion of a jury, but in the shape of particular damages, especially contracted for by the agreement itself—should he not aver in his declaration notice to the defendant, before action brought, of such particular damage, and the amount?—Henderson v. Nichols, 398.

Averments on a Special Agreement.] In declaring on a special agreement, Quere, what must be averred in the declaration to have been done? or what may be left to be set up as matter of defence in the plea, if it has not been done? Semble, that the intention of the parties, to be reasonably collected from the whole instrument, must govern.—Ewart v. Bowes, 445.

Penalty. Liquidated Damages.] Where the plaintiff, in an action of debt on an agreement, lays his breach in such a manner as to make it uncertain whether he is not claiming his damages in the shape of liquidated damages, by reason of a failure in some very minute particular of agreement-as if, for instance, the breach complained of was, that the defendant did not, by the 1st of September, clear of all the standing timber, nor did he fence the said land, the court will not look upon the sum mentioned in the agreement as anything but a penalty, though the parties may have agreed to call it liquidated damages; and semble, even though the parties have in terms agreed that the sum named should be regarded as liquidated damages and not as a penalty.

Where a certain sum is claimed by way of liquidated damages in an action of debt for the non-performance of an agreement, and the court are of opinion that the sum mentioned in the agreement is in the nature of a penalty, and not of liquidated damages; Held, per Cur., that the statute 8 & 9 Will. III. ch. 11, will, when such an opinion is pronounced by the court, restrict the plaintiff from recovering more damages than he has received by reason of the breach, and that a demurrer

Averments on a Special Agreement.] therefore to the declaration would be a declaring on a special agreement, bad.—Ainslie v. Chapman, 313.

Case. Freight. Demurrage. Agreement.] The plaintiffs were owners of the Lady Bagot, in which wheat was brought down Lake Erie to the defendant, to be stored for Messrs. Young & Co. When it was brought to the defendant, the master of the schooner demanded 221. 10s. for freight, and 1901, for demurrage, and said he had a lien on the wheat to that amount, and wished the defendant to pay it, before he would deliver the wheat; this the defendant declined but it was agreed between them, that the defendant should receive the wheat upon giving the following undertaking in writing: "I will retain 750 bushels of wheat, the property of Messrs. Young and Co. of Montreal, and part of the Lady Bagot, until your claim for demurrage, for detention of the schooner Lady Bagot at the port of Sandusky, is settled, also covering freight on amount retained,"

The plaintiffs subsequently demanded the wheat from the defendant, who although still retaining it in his possession, declined to give it up to the plaintiffs, saying that he was indemnified by Messrs. Young & Co., who refused to pay the plaintiffs' claim.

The plaintiffs, upon these facts, sued the defendants on three counts: 1st, specially upon the case, alleging the plaintiffs' right to lien for freight and demurrage—then setting out the agreement, and assigning as a breach of the defendant's duty, his delivering the wheat to Messrs. Young & Co., without payment of plaintiffs' lien; 2nd, upon an agreement to redeliver the wheat to the plaintiffs

when requested, and a breach of duty in not delivering; 3rd, in trover.

Held, per Cur., that the evidence did not support the first count, as the defendant still retained the goods; nor the second count, as there was no agreement to re-deliver to the plaintiffs; nor the third count, as the agreement admitted the property in the wheat to be in Young & Co., and not in the plaintiffs.

Held also, that the second count, being properly in assumpsit, could not be joined with the count in trover, and that the plaintiffs, under the circumstances, had no lien for either freight or demurrage.—Land et al. v. Woodward, 190.

Case. Demurrer to Plea.] Declaration on the case for falsely alleging, that a certain hotel stood upon the land of defendant, whereby plaintiff was induced to purchase defendant's land, the defendant well knowing that the hotel was not on his land but on other land, to wit, lands adjoining to the defendant, and belonging to the Queen. Plea, 1st that the said hotel was not erected upon the land of the Queen, as, &c.; 2ndly, that the plaintiff had notice and was well aware that the false representations, &c., were false, and if damnified thereby, be was damnified of his own wrong, and through his own default; Held, per Cur., on demurrer to both of these pleas, pleas bad. Held, aslo, on exceptions taken to the declaration (which is given at length in the report), declaration good in substance, though loosely framed,-Tennery v. Stiles, 254.

Case. Diverting the Water of a Stream. Plea, Justification. Demurrer.] A. sues B. in an action on ceptor

the case for injury to his mill, by diverting the water of a stream at a point above. B, pleads in justification, that A. had erected a dam which penned back the water and made it overflow on defendant's close, wherefore the defendant dug trenches into the stream to lead off the water, as he had a right to do; Held bad on demurrer.—Adamson v. McNab, 438.

Parties. Mistake in the name of Defendant. Demurrer.] several members of a firm being sued as indorsers of a promissory note, one of them was by mistake called Charles Jones, his Christian name being William; Held, per Cur., that the variance could occasion no difficulty on the trial, the only question being as to the identity of the party. The defendants if they desired to take an exception, should have moved under the statute 7 Will. IV. ch. 3, to compel the plaintiff to amend his declaration.-Ketchum v. Jones and Cotton, 460.

Demurrer to Note. Initial letters of Indorsees against maker and indorsers of a promissory note, under our statute 3 Vic. ch. 8. "For that whereas the said George C. Roblin, on, &c., made, NC., and the said Philip J. Roblin, endorsed, &c." Demurrer: because George C. Roblin, and Philip J. Roblin, were not declared against by their proper names as given them in baptism, but merely by the initial letters of one of their first names. Held, per Cur., declaration good. Commercial Bank v. Roblin, 498.

Demurrer to a Bill. Names of Firm. Indorsensnt by Firm. How to aver.] Indorser against the acceptor of a bill of exchange

"For that whereas certain persons trading under the name, style and firm, Desbarats & Derbyshire, on, &c., made their bill in writing, and thereby required the defendant to pay the said Desbarats & Derbyshire or order, &c., and the said Desbarats & Derbyshire then endorsed the same to the plaintiff, &c.

Demurrer: because the said supposed drawers of the said bill were not properly described or designated by their Christian names, neither was any excuse offered therefor; nor was it alleged that the said supposed drawers drewthe said bill of exchange by the name, style, or firm in the said declaration mentioned; Held, per Cur., declaration bad. — City Bank of Montreal v. Eccles, 508.

For Christian names and initials, vide also Playtor v. Turner, 555.

A verdict or an award specifying the amount of damages against two joint trespassers, whether paid or not, a bar against the other. Action of Debt. Secus.] A verdict or an award, specifying the amount of damages against one of two joint trespassers, is in itself a bar, whether paid or not, to any action against the other, and has the same effect as a satisfaction by him would have had in precluding any action against his cotrespasser; it is therefore unnecessarv in the plea to an action of trespass, setting out the award of damages, to aver that the sum awarded has been paid. It would be different, however, in pleading an award to an action of debt, in which two are jointly bound; there, unless payment of the award by averred, it is no bar.-Adams v. Ham, 292.

Bankruptcy. Confession of judgment, how to plead it.] A confession of judgment stated in the pleading to have been given "in contemplation of bankruptcy, and for the purpose of giving one of several creditors a preference, and with the intent to delay and defeat other creditors," is well pleaded, without further adding that it was given within a month of the issuing of the commission against the bankrupt.—Brent, assignee, v. Perry, 538.

Govenant. Plea. Demurrer.] Declaration in covenant on a mortgage to pay a sum of money on a day named. Plea, that the defendant had not broken his covenant; Held, per Cur., plea bad on special demurrer.—Mitchell v. Linton, 331.

Case. General issue—what put in issue under that plea.] Case against the defendant as a common carrier for loss of goods. Plea, not guilty. andly, that it is a custom in navigating Lake Ontario, to carry cargo on deck: that the plaintiff's goods were laden and stowed on deck, and that a storm arising they were of necessity thrown overboard, for the preservation of the vessel and cargo. Replication de injuria, generally, not expressly admitting, nor specially traversing the custom; Held per Cur., that under these pleadings the custom of the trade as well as all questions tending to shew negligence, either in the method of loading, or in the management of the vessel, or in throwing overboard the goods without adequate reason, were put in issue.-Paterson v. Black, 481.

Pleading. Toronto Club House demise—trespass for turning servant out of possession of apartments in club.] Pleadings; as to the mode of setting out an alleged demise from the Toronto Club of certain rooms and apartments in the club house, to a servant or steward of the club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass. Semble, that under the demise, as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed, he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments.-Williams v. Herrick, 613.

De injuria to two pleas to a note. Demurrer.] William Allan, one of the defendants, was sued as maker of a promissory note, payable to Meyers or order, and indorsed to plaintiff.

He pleaded 1st, want of consideration for making the note; that it was made by him and endorsed by Meyers, for plaintiff's accommodation.

andly, That before the note was due, and after plaintiff took it by indorsement, he indorsed it over to a third party for value, who is now the holder of the note, and to whom and not to the plaintiff the defendant is liable.

The plaintiff replied de injuria to these two pleas in one replication, which the defendant demurred to. Held, per Cur., Replication good to first plea, but bad to second plea.

Where a plaintiff replied de injuria to two pleas in one replication, which is demurred to, judgment may be given for the plaintiff on demurrer as regards part of his replication, and for the defendant on another part,—McCuniffe v. Allan & Meyers, 571.

De injuria. Failure of considertion, or want of consideration.] The replication de injuria to a plea setting up as a defence to the note a failure of consideration, or want of consideration, is good.—Macfarlane v. Kezar, 580.

Plea. Set off on special agreement. Denurrer.] Declaration on the common counts. Plea—a set off on the common counts, and also upon a special agreement under seal to give the defendant so much per cord for cutting wood, and alleging that so many cords of wood had been cut. Held, per Cur., a demurrer to that part of the plea of set off relating to the special agreement, that the plea was good.—Geddes v. McCracken 573-

Densurrer. Note for £500. Damages £200. Plea to body of Note-Demurrer.] The declaration on a note for £100 claims damages for the non-payment of the note £200. The defendant pleads as if to the whole cause of action, a defence applicable to the £100 in the body of the note, and not to the £200 damages. Held, per Cur., on demurrer, plea bad.—Clapp v. Murdoff, 563.

Common counts. Damages £200. Plea, payment of £3. Demurrer.] Declaration on the common counts, laying the damages at £200. Plea—accord and satisfaction, by the payment of £3 in full of all damages in the declaration mentioned. Held, per Cur., on demurrer to plea, plea bad in setting up the payment of £3 as a satisfaction of £200 claimed.—O'Beirne v. Gowin, 582.

Immaterial issue on the plea of the Statute of Limitations.] To a plea of the Statute of Limitations, the plaintiff replied that when the cause of action accrued he was in

foreign parts, &c., and did not return to this province till the 1st July, 1846. The defendant rejoined that the plaintiff did not, on the day named, or at any time, return to Upper Canada, Upon this the defendant proved that the plaintiff was not at any time in this province, and asked to nonsuit the plaintiff; but, Held, per Cur., that the issue was immaterial, and the defendant not entitled to a nonsuit.-Crosby v. Collins, 545.

Surrender.] Where the surrender relied upon is one produced by act and operation of law, it must be so pleaded. A defendant in an action of trespass, failing to prove the surrender of a term of years from the plaintiff to himself, upon an issue arising out of a plea of liberum tenementum, may nevertheless consistently hold a general verdict upon another issue, denying the close to be the close of the plaintiff.-McNeil v. Train, or.

False Arrest. Trespass. stable. Plea. 1 A defendant sued in trespass for a false arrest, and intending to urge in his defence, that he was arrested as a constable, and that the action against him was brought in a wrong county, will not be entitled to do so, if he has omitted to insert in the margin of his plea "by statute," unless the court can say, upon the facts proved at the close of the plaintiff's case, that the defendant was acting as a constable. -Brown v. Shea, 141.

Landlord and Tenant. Immaterial Issue.] Semble: that a plea of nunquam indebitatus to an action by the landlord against the tenant for not giving him notice that he had ejectment, is a material issue, upon which a judgment may be entered for the defendant, if the verdict be so found.-Lount v. Smith, 302.

Covenant for further Assurance. Averments.] In an action upon the common covenant for further assurance, the covenantee must aver in his declaration, that the conveyance which he required was devised by himself or his counsel, and tendered to the party to be executed. Macaulay. J., dubitante.-Hoyt v. Widderfield. 180.

Covenant. Averment. Breach. Demurrer.] The plaintiff declared in covenant against the defendant, for that the defendant covenanted that he would pay to the plaintiff the sum of money in the proviso of the indenture mentioned, upon the day and time appointed for payment thereof, in and by the said proviso. Breach, that the defendant did not, nor would, pay to the plaintiff the sum of 341. 15s., and interest for the same, on the day and time appointed for payment thereof, as aforesaid. but therein failed and made default, &c. Demurrer thereto. Held, per Cur., declaration good.—Courtenay v. Sinclair, 311.

Covenant for Non-payment of 3001. Plea as to 501., Parcel, &c. Demurrer.] To an action of covenant for the non-payment of 300%, on the days and times in the indenture mentioned, the defendant pleaded that "as to the sum of 50l., parcel of the sum of money in the breach assigned, the defendant saith, that before, &c., he paid to the plaintiff the sum of 50l. in full satisfaction of the sum of 50l., parcel, &c., which the plaintiff then accepted in full satisfaction of the said sum of £, been served with a declaration in parcel, &c.; Held, per Cur., on demurrer to plea, plea good.—Fralick v. Huffman, 562.

Case. Argumentative plea.] Case: The declaration complained that the defendant, contriving and intending to injure him, caused his (the plaintiff's) horse to be driven upon certain premises, not being the plaintiff's, and without his knowledge, by means whereof the plaintiff's horse was there distrained for rent then due in respect of the premises, and which rent the defendant then knew was in arrear; and that his horse being distrained, was sold, and so became lost to the plaintiff. Plea, that the defendant received the horse from the plaintiff's bailee, and returned him to him-which returning the horse was the same grievance of which the plaintiff complained; Held, per Cur., on demurrer to plea, plea bad, as amounting to the general issue of "Not Guilty."-McAnany v. Meyers, 587.

PRACTICE.

Nisi Prius record. Altering of record after it has been passed at the Crown office. Refusal of Clerk of Assize to receive record. **Fudgment** as in case of non-swit.] Where the clerk of assize refused the plaintiff to receive his record, because it had been altered after it had been passed at the crown office, by the plaintiff's adding a similiter to the defendant's plea, and entering in the margin the venire facias - Held per Gur., on an application by the defendant for judgment as in a case of a nonsuit, that the rule for judgment must be made absolute. - Doe dem. Wilcox v. Jacobs, I.

Record lost. Substitution of another by consent of Attornies. Not passed at

Where a record has been lost just before the assizes, the attornies on both sides cannot agree to substitute for it a record which has not been passed in the principal office, and which has not been sealed. A verdict had upon such a record, will be set aside as upon an illegal trial.-Doe Baldwin v. Wentz, 150.

Two defendants. One allows judgment by default, and one pleads to issue. Plaintiff does not proceed to trial, &c. Judgment as in case of nonsuit, by whom to be moved. Where there are two defendants, and one pleads to issue, and the other allows judgment to go by default, and the plaintiff does not proceed to trial pursuant to notice, the application for judgment as in case of a nonsuit, cannot be made by both defendants, but only by the one who has pleaded.

Semble, that even in a joint action of assumpsit, one of several defendants jointly sued may move for judgment as in case of a nonsuit .-Brunskill v. Chumasero, 270.

Objections taken in banc, but not taken either at the trial or in moving for rule. Conversations with Jury. In an action for malicious arrest, the defendant cannot succeed in banc in nonsuiting the plaintiff, or in obtaining a new trial, on the ground that no probable cause was shewn, if he took no such objection either at the trial, or in moving for his rule.

The court will not act upon affidavits, stating conversation with one of the jury, after the trial, respecting the ground of their verdict .- Jones v. Duff, 143.

Enlargement of Rule Nisi for judgoffice nor sealed. Setting aside verdict. ment. Enlarged till first day of ment, as in case of a nonsuit, was enlarged until the first day of the next term, and on the second day of the term the rule was made absolute, no cause being shown against it the court, though they held the defendant regular in moving his rule absolute when he did, allowed the plaintiff, nevertheless, upon affidavits filed during the term, to have the rule nisi re-opened for argument. Stewart v. Davis, 268.

Testatum Act, 8 Vic. ch. 36. Service of papers on defendants and Attornies.] The Testatum Act, 8 Vic., ch. 36, now governs the mode of service of papers on the defendants or their attornies. It has done away with the former mode of service, provided by the rule of court, Michaelmas Term, 4 Geo. IV.

See also, Parke v. Anderson, and Parke v. Mead, page 2.

Time of filing of appearance per Statute.] Appearance by the plaintiff for the defendant under the statute, must be filed before the end of the succeeding term, after process is returnable.—Condy v. Moffatt, 450.

Clerical Error in notice to produce.] Where in an action on the case for malicious arrest, the plaintiff's attorney served the defendant's attorney with a notice "to produce the writ of ca. re., issued, &c., at the suit of A. against the defendant in this cause;" Held, per Cur., that the notice was sufficient to let in secondary evidence, the mistake in using the word "defendant" for "plaintiff" being a mere clerical error which could not mislead.—Wilson v. Gilmore, 212.

Nolle prosequi as to one of two excation, set aside the judgmeeutors.] Where a plaintiff sues and all proceedings thereon.

two or more defendants as executors, the entering a nolle prosequi and discontinuing as to one, is not a discontinuance of the action.—Masson v. Hill et al., executors of Hill, 66.

Hab. fac. Poss. Injunction from Court of Chancery. Alias Writ.] Where the sheriff puts a plaintiff in possession under a writ of hab. fac. pos. and the plaintiff afterwards quietly relinquishes that possession, in consequence of hearing that an injunction had issued from the Court of Chancery; Held. per Cur., that upon the injunction being dissolved they could not grant the plaintiff an alias writ of possession.—Doe Deane v. Henderson, 208.

Record pleaded of another court. Of the same court. Practice as to bringing in Record.] Where the record pleaded is of another court, the practice is to take out a rule appointing a day to bring in the record into this court; otherwise, where the record pleaded is of the same court—there a mere notice will be sufficient.—Hamilton v. Shears, 306.

Setting uside a plea of release.] It is only in very clear cases that the court will exercise their jurisdiction in setting aside a plea of release on the ground of fraud.—Smith v. Dissit, 206.

Cognovit. Entering judgment thereon, and issuing fi. fa. in outer district. No previous proceedings therein.] Where a judgment had been entered on a cognovit, and a fi. fa. issued thereon in the office of the deputy clerk of the crown of an outer district, without the suit having been previously commenced in that office by issuing process or otherwise, the court, upon application, set aside the judgment, writ, and all proceedings thereon.

Semble, that the assignees of a bankrupt defendant sufficiently represent the interests of the bankrupt estate to move on this exception to the judgment.—Commercial Bank v. Brondgeest, 325.

Court will not try facts on affidavits.] The court will not try matters of fact on affidavits. Where therefore the defendant moved to set aside a verdict for irregularity, because the notice of trial had not been served eight days before the assizes, and the plaintiff's attorney swore that the defendant's attorney agreed to take short notice of trial, which the plaintiff's attorney denied—Held, per Gur., that the verdict must be set aside.—Smith v. Ask, 497.

Due Notice of Trial.] Under special circumstances, verdict for the plaintiff set aside for irregularity, in not giving due notice of trial, but without costs.—Goula v. Carr, 506.

Several Defendants,—one allows Judgment to go by Default. Nonsuit.] In an action against several defendants, though one suffers judgment by default, the plaintiff may be nonsuited.—McNab v. Wagstaff, 588.

Service of Papers an Attornies, &-c.] The rules of this court of Michaelmas Term, 4 Geo. IV., respecting the service of pleadings and papers in a cause, on an attorney residing out of the district in which the action is brought, apply equally to all districts, and to the attorneys for both parties in the suit.—Clemow, Assignees, v. H. M. Ordnance, 458.

Amendment at the Trial, when the Amendment must be made.] Variance between proof and deed declared on, counsel must determine at the trial whether they will amend under the

statute; leave cannot be reserved to amend the record afterwards,—Mc-Farlane v. Brown, 471.

Interlocutory Judgment signed too soon. Wavier of Irregularity.] A plaintiff, apprehensive that he may have signed interlocutory judgment too soon, cannot cure his irregularity by filing and serving a replication and notice of trial conditionally, viz. to take effect in case the judgment should be set aside.

Semble, however, that the defendant, by arguing the conditional replication, on a demurrer, may waive its irregularity.—McPherson v. Dickson, 476.

Service of Notice of Trial, what sufficient. Notice of moving against Verdict.] Leaving a notice of trial at an office of an attorney, is not a service, unless it is sworn to have been given to some person there.

Where a notice of trial is not shewn to have been served, no notice of intention to move against the verdict can be required, and the verdict may be set aside, without an affidavit of merits.—Consumers' Gas Company v. Kissock, 542.

Absconding Debtor. Non filing of Affidavit. Copy of Process not being put up in Crown Office. Irregularity.] The not putting up in the Crown Office a copy of the process issued against an absconding debtor, as well as the not filing the affidavit the statute requires before taking out execution, being mere irregularities, will not have the effect of making void what was done under the execution.—Doe Boulton v. Fergusson, 515.

What an Issuable Plea.] Covenant on an indenture, made on the 10th November, 1844, assigning as a breach that at the time of making the indenture, the defendant had no title. The defendant, who was under terms to plead issuably, pleaded a derivative title to him at a period prior to the making of the said indenture. The plaintiff signed judgment, treating the plea as a nullity. Held, per Cur., judgment regular. Robinson, C. J., dissentiente.—Dickson v. Boulton, 558.

Verdict taken subject to Award. No award. Verdict set aside.] Cause referred at Nisi Prius, and verdict taken for the plaintiff, subject to the reference; award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made; and after that day had passed, the defendant's attorney was asked by the plaintiff's attorney to consent to a further enlargement, and declined; no application had been made to the arbitrators; the Court held, they could do nothing more than set aside the conditional verdict .- Moulson v. Eyre, 470.

Application for attachment for nonpayment of money under an award. Entitling of papers. Rule nisi. Affidavit of service, &c., &c.] In an application for an attachment for the non-payment of money ordered to be paid by an award, the submission being by bond, the rule nisi was entitled "In the matter of A. v. B." The affidavit of service was entitled in the same way. The rule making the submission by bond a rule of this court was entitled "In this court A. v. B." The affidavit of the execution of the award was entitled "In this court" only. Held, per Cur., that the entitling of the rule nisi and the affidavit of service thereof, And also, that there was correct, was no material variance between the entitling of the rule nisi and the

the indenture, the defendant had no other previous papers.—In the mattitle. The defendant, who was unter of Beckett v. Cotton & Rowe, 271.

Assent of both parties to an award required, to ortain due enlargement of time for making award.] Where a cause was referred by a rule of reference at nisi prius, and the rule of reference and an enlargement of the time for making the award (which enlargement did not appear upon the face of it to have been assented to by both parties) were made rules of court, the court, upon an application for an attachment for the nonperformance of the award, refused the attachment, upon the ground that the enlargement of the time was not shewn to have received the mutual consent of both parties. -Ruthven v. Ruthven, 273.

Setting aside the making of the rule of nisi prius a rule of court. Also, the enlargement of time endorsed on said rule. Also, the award itself.] Where a cause was referred at nisi prius, and the rule of reference was made a rule of court, together with an enlargement of the time for making the award which had been endorsed on the rule of reference; but there being no authority contained in the rule of reference to enlarge the time, and such enlargement not having been assented to in writing by both parties: Held, per Cur., upon an application to set aside therule making the order of reference and the enlargement of time thereon endorsed a rule of court and also the award founded upon the said reference and endorsement; that, 1st, the rule, so far as it made the rule of nisir prius a rule of court, could not be set aside, andly, that that part of it making the enlargement of time endorsed on the said rule a rule of court might

be set aside; 3rdly, that as in strict- | the judge's notes .- City Bank v. ness both parties must be taken verbally to have assented to an enlargement of the time to the 23rd of November, when the award was made, the award could not be set aside.—Ruthven v. Ruthven, 276.

Amendment of demurrer.] Semble. that a demurrer cannot be amended without the consent of the opposite party. Where, therefore, the defendant, intending to demur to the replication to the second plea, did in fact demur to the replication to the first plea; Held, per Gur., that they could not decide upon this demurrer, as if it were a demurrer to the replication to the second plea.-Perry v. Grover, 331.

Judgment of non pros. Similiter not served.] Judgment of non pros. cannot be signed because the plaintiff has not served a similiter (see 19th rule Easter Term, 5 Vic.) upon issue joined. The court in passing the record, will add the similiter, as of course.-Young v. Stockdale, 332.

Effect of a stay of proceedings. Amendment of verdict by Judge's notes.] When a rule, with a stay of proceedings, has taken out and served, to shew cause why a verdict rendered should not be set aside for irregularity, a notice of argument of demurrer, and the setting down the same demurrer for argument, given subsequently to the rule, will be set aside with costs.

Where it appears on the notes of the learned judge at the trial, that a verdict should be entered for the plaintiff on one count, and for the defendant on the other, and a verdict has been erroneously entered for the plaintiff on both counts, this is a mere mistake in the entry on the record, which may be amended by

Eccles, 633.

Affidavit. Interlineations. Commissioner. Writ of Summons. ting aside a service of process. Grounds of irregularity. How shewn to the Court.] It is not necessary that the commissioner should put his initials opposite interlineations in the affidavit itself, or notice such interlineations in the jurat.

There must be eight days between the teste and return of a writ of summons sued out against a member of parliament.

Where a rule nisi is moved to set aside the service of process on grounds disclosed on affidavits filed, and the irregularity complained of is in the copy of the process annexed to the affidavits filed, and does not appear in the affidavits alone, the rule will be discharged.-Lyster v. Boulton, 632.

Ca Re. Notice endorsed thereon. Must it be written on the copy? service of a copy of ca. re. will be set aside, unless a notice to appear thereon be written pursuant to the statute.

Quære. Must this notice be written on the copy of the writ? May it not be written on a piece of paper attached to it.-McTiernan v. Mc-Chesney, 631.

Judge's order for writ of inquiry. Assessment of damages at nisi prius. Remanet. A subsequent writ of inquiry to District Court.] It is not necessary to obtain a rule of court, or a judge's order, to warrant the issue of a writ of inquiry to the District

A plaintiff enters a record at the assizes to assess damages. cause does not come on in its order, and is made a remanet, The plain-.

tiff subsequently sues out a writ of not be allowed to take any proceedenquiry to the District Court. The defendant moves to set this writ aside, and all subsequent proceedings, for irregularity, the cause having been made a remanet at nisi prius. But, Held, per Cur., writ of inquiry regular .- Northcote v. Hodder, 635.

Judgment as in case of a non-suit. When to be moved.] When issue was not joined till about the middle of August, and the plaintiff not having given notice of trial for the October assizes following, the defendant moved in the November term for judgment as in case of a non-suit; Held, per Cur,, that the application was made too soon after issue had been joined.—Cuvillier v. Privat, 613.

Cognovit. Payment entered thereon in outer district, no proceedings having been had there. Principal office. Entry of judgment and docquetting there. Effect of.] A judgment entered upon a cognovit by a Deputy Clerk of the Crown in an outer district, no previous writ or proceeding having been issued or taken out of or in such deputy's office, is in itself void. Semble, however, that if the judgment had been transmitted to the principal office in Toronto, and an entry had been made there so as to constitute an entry of judgment on the face of the judgment roll, or so as in the terms of the statute 8 Vic. ch. 36, s. 4, to enter the judgment of record and docket it in the principal office, it might have been upheld.-Laverty v. Patterson, 641.

Judgment of nonsuit entered. Subsequent proceedings by plaintiff.] Where judgment of nonsuit has been entered against the plaintiff, he will ings in the suit, or to call on the defendant to answer him.-Bays v. Ruttan, 634.

Ca.Re. issuing out of office of Deputy Clerk of Crown of one district directed to Sheriff of another.] An original ca. re. may, under the 8th Vic. ch. 36, issue out of the office of the Deputy Clerk of the Crown of one district, directed to the Sheriff of another district,-McMann v. Paterson, 631.

Judgment as in case of a nonsuit. Refusal of judge to try cause.] refusal of a judge at nisi prius to try a cause upon an immaterial issue, places the record in the same position as if it had beem made a remanet, The defendant therefore cannot have judgment in such circumstances, as in case of a nonsuit.-Hodgson v. Stevens, 625.

Cognovit. Executor and Executrix Fudgment.] A. and B. executor and executrix, having given a cognovit signed by them as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only in their representative chaacter; Held, per Cur., that though the cognovit might bind them personally in its terms, that a personal judgment entered up against them must be set aside. Semble also, that the judgment roll, alleging "a debt due by the testator in his life time on an account stated, in consideration of which the defendants promised to pay," would not warrant a judgment against the defendants personally. but only against them as executor and executrix. - Gorrie v. Beard, 626.

PRINCIPAL AND AGENT.

General Agency. Special Agency.] Where A. the general agent for ship-

ping B.'s flour, shipped twenty-five barrels of it as usual to A. & Co., in Kingston, and before the sailing of the ship, D., another agent, under special instructions from B. shipped the same flour to Messrs. B. & Co., in Kingston to be forwarded to Montreal: Held, per Cur., that as the owner of the flour could at any time change its destination before the ship sailed, the owners of the ship were liable to B., through their master's last bill of lading given to the special agent D., the flour having been forwarded by the master in mistake to Messrs. A. & Co., in Kingston, and left there, instead of being forwarded as last directed through B. & Co. to Montreal.-Graham v. Browne & Browne, 234.

RACING.

Proprietor of a Race Course, his liability for Purse.] The proprietor of a race course is responsible for the purse run for, if an express promise to that effect can be proved.-Gates v. Tinning, 540.

REGISTRAR.

Charge for fee. Entry in margin of the Memorial.] Under the new Registry Act, 9 Vic. ch. 33, the registrar has no right to charge a fee for the entry he makes in the margin of the memorial.—Keele v. Ridout, 240.

Registry when land in several Townships. Fees of.] Held, per Cur., That under the new Registry Act, 9 Vic. ch. 34, the registrar must record the memorial for a deed, &c., in every township in which there are lands situated which are embraced in the deed. Also, that he need not enter in the book of any township, other ship; and also, that his proper fees are 2s. 6d. for the first hundred words of the registration in each book, and is. for every hundred words over the first hundred in such registration.-Smith et al. v. Ridout,

RENT-CHARGE.

Issuing out of a freehold estate and granted for life, cannot bs sold as a chattel under a fi.fa. goods.] A rentcharge issuing out of and chargeable upon a freehold estate, and granted to a person for his life, is not subject to be seized and sold as a chattel under a writ of fi. fa. against goods. -Smith v. Turnbull, 586. .

REPLEVIN.

Jurisdiction of District Court in. The Replevin Act of this Province, 4 Wm. IV., ch. 7, gives jurisdiction to the District Court only in casesof seizure for distress.

Quære? Can the action of repleving be sustained in any court at this day upon a mere tortious taking or detention, not in the nature of a distress.-Foster v. Miller, 509.

REPLEADER.

Nonsuit.] There can be no repleader where the plaintiff has been nonsuited, and so out of court.-Lount v. Smith, 302.

SET-OFF.

Jurisdiction of District Court, in Matters of.] Where there are open running accounts between plaintiff and defendant in the District Court, made up of divisible items; not exceeding in each £25, the defendant can only recover, by way of set-off, the difference between £25 and the amount due to the plaintiff. If the lands than those lying n town-defendant however desires to re-

plaintiff's demand, he must give notice of or plead a set-off to the 251., and claim in his plea or notice to have the amount between the plaintiff's demand and the 251. allowed

McLean, J., aissentiente, being of opinion that a defendant upon a setoff might recover a balance to any amount beyond the 251., the jurisdiction of the district court not being limited as to a defendant's set-off.-Russell v. Conway, 256.

Action by Auctioneer. Set-off as between . Defendant and Third Party.] To an action by an auctioneer against a purchaser for goods sold, the purchaser pleaded that 'A. delivered the goods to the auctioneer to sell; that A. was the agent of B., to whom the goods belonged; and that he (the purchaser) had a set-off against 'B., which he pleaded.

Quære.-Could the purchaser plead this set-off against B., without further alleging that the auctioneer sold the goods to him as the goods of B. ? (Robinson, C. J., was of opinion that he could not, Jones, J., contra, Macaulay, J., and McLean, J., gave no opinion on this point, as the decision of the court upon the other point decided the demurrer in the plaintiff's favour.)-Wakefield v. Gorrie, 160.

SHERIFF.

Sheriffs Deed, what it conveys.] A sheriff's deed, being but a completion of the sale, is only good for land actually sold; a party therefore is not estopped by a sheriff's deed from proving by parol, that portions of the land therein described as sold, were not in fact included in the sale; and if the description of

cover more than will balance the the whole land in the deed is so blended together, that one cannot distinguish between what was sold and what was not, the deed will be bad.—Doe Miller v. Tiffany, 79.

> Sale by Ex-Sheriff out of Office. Incipient step while in Office. Advertisement in Gazette.] Semble .-That to support a sale by an exsheriff out of office, it must appear that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of and duly followed up such step after leaving the office.-Ib.

> Semble, also, that the mere receipt of a writ by the sheriff while in office, will not of itself be an incipient step in the execution of it.-Ib.

> Quære.-What step will be a sufficient commencement of the execution of a writ against lands?

> Will an advertisement in Gazette, or otherwise, according to the statute, I Geo. IV., ch. I, sec. 20, be sufficient?-Ib.

> Action by Sheriff against Bailiff. Escape of Prisoner. Costs.] action on the case lies in favour of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages; and semble, that in such action, the sheriff is allowed to recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff. the bailiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name.-Ruttan, Sheriff, v. Shea, 210.

Fustices.] The 21 Jac. I. c. 12, extends its privileges to sheriffs when acting under the commands of the justices,-Fraser v. Dickson, 231.

Action by, against Bail to Limits Costs.] Where one of the bail for a debtor admitted to the limits, hearing of the debtor's escape, paid to the sheriff the amount of debt and costs for which he was imprisoned, exclusive of the sheriff's own fees, and the sheriff nevertheless sued the other of the obligors in the limits bond, in order to recover from him the amount of costs in an action which the plaintiff in the original action had brought against the sheriff.

Held, per Cur., that after the receipt by the sheriff of the money paid by the other of the bail, he could not recover for those costs, since he ought to have paid over the money, and not defended the action, nor allowed it to proceed.-Corbett, Sheriff, v. Lake, 454.

Liability of, on Commitments by Magistrates directed to Gaoler. May take the benefit of 24th Geo. II. c. 44.] Semble, that a sheriff is not liable in trespass on commitments by magistrates directed to the gaoler, that turn out to be informal and insufficient, unless he has become in some way a party to the imprisonment. Semble, the sheriff, though a superior officer to the gaoler, comes equally within the benefit of the 24 Geo. Il. ch. 44. - Fergusson v. Adams, 194.

SCHOOL TRUSTEES.

Personal liability of.] School trusacting under the statute 9 Vic. ch. 20, cannot be sued as in- justification. - Mills v. James, 216.

Acting under the Commands of the dividuals upon any contract made by them under the statute as trustees. -Sheriff v. Patterson, 620.

> See also Anderson v. Vansittart, 335.

STATUTES, CONSTRUCTION OF.

4 Will. IV., ch. 32, sec. 5. Port Credit Harbour Tolls. | Under the statute 4 Will. IV. ch. 32, sec. 5, parties receiving benefit from the Port Credit Harbour in its present unfinished state, must pay the tolls prescribed.—Port Credit Harbour Company v. Jones et al., 144.

59 Geo. 3. ch. 3, I Wm. IV. ch. 2. Husband and Wife. Deed. Examination of Wife. Grantee's possession.] Under our act 39 Geo, III. ch. 3, a deed executed by husband and wife, but without an examination of the wife and a certificate thereof; is void; so that notwithstanding the deed, the husband may maintain ejectment during the coverture .-I Wm. IV., ch. 2.

Semble, however, that under the more recent act I Wm. 4, ch. 2, the grantee's possession cannot be disturbed during the lifetime of the husband. - Doe McDonald v. Twigg.

10 & 11 Vic. ch. 15, sec. 5. Certificate of the Clerk of Crown to Sheriff to admit prisoner to the limits.] Under the 10 & 11 Vic., ch. 15, sec. 5, the Court will not direct the clerk of the crown and pleas to give the certificate to the sheriff to admit a prisoner to the limits, without the clerk is first satisfied that notice of bail for that purpose has been given to the plaintiff in the action, so that he might, if he had so chosen, have excepted to them in due time before: Registry act, 9 Vic. ch. 34.] Under the new Registry Act, 9 Vic. ch. 34, the registrar has no right to charge a fee for the entry he makes in the margin of the memorial.—Keele v. Ridout, 240.

Registry act.] See also Smith et al. v. Ridout, 617.

Public sale of Lands and Goods under execution.] 43 Geo. III. ch. 2; 2 Geo. IV ch. 1, sec. 20, clearly contemplate a public sale in regard to lands, and that has always been the course, both with respect to lands and goods. Per Robinson, C. J.—Doe Miller v. Tiffany, 88.

Estate of a Taitor concerned in the Rebellion of 1837. I Vic. ch. 10.] The estate of a traitor, concerned in the rebellion of 1837, and who accepted the benefit of the provincial statute I Vic. ch. 10, is at once by such acceptance as much vested in the crown under the operation of the 33rd Henry VIII. ch. 20, sec. 2, without office found, as afterwards.—Doe Gillespie v. Wixon, 132.

4 & 5 Vic. ch. 100. Clergy Reserves. Assignees of Purchasers.] The eighteenth clause of the land sale act, 4 & 5 Vic. ch. 100, does not apply to clergy reserves.

Semble, per McLean, J., that the 18th clause of the land sale act, does not apply to the assignees of purchasers.—Doe Weisenberger v. McGlennon, 138.

of l. 2 Geo. IV. 21 Jac. I. Attachment of Privilege. Constable.] Quare? Is an attachment of privilege within the 9th clause of the 2 Geo. 4. And quare? would this doubt, or the want of an affidavit being annexed to bailable process, prevent the defendant, a constable, from having the benefit of the 21 Jac. I, on the point of venue.—Brown v. Shea, 141.

8 Vic. ch. 13, sec. 51; Attorney. District Court.] Under 8 Vic. ch. 13, sec. 51, a writ may go to the district court to try an issue in which an attorney is defendant.—Martin v. Gwynne, 245.

52 Cl. 4 Wm. IV. ch. 1. Succession of Trespassers on deserted lands.] Quære? the effect of a succession of trespassers taking possession of deserted land at intervals, and not claiming under each other. The application of 52 cl. 4 Wm. IV. ch. I.—Doe Baldwin v. Stone, 388.

8 & 9 Vic. ch. 93, sec. 89. Surveyor of Customs.] Witness. Under the Imperial Act, 8 & 9 Vic. ch. 93, sec. 89, the surveyor of customs, not being the party either. "seizing or informing" is not entitled to a share of the penalty. He cannot therefore be rejected as an incompetent witness upon a case of information for a penalty for harboring smuggled goods.—Attorney General v. Warner, 485.

21 Jac. I, ch. 12. Sheriff's. The 21 Jac. I, ch. 12, extends its privileges to sheriffs, when acting under the commands of the justices.—Fraser v. Dickson, 331.

SURRENDER.

Pleading. Evidence. By Deed. By Law. Consistent issues.] The mere allegation in the plea "of a surrender of a term of years to the defendant by the plaintiff," makes it incumbent on the defendant to prove an actual surrender made by the plaintiff, by deed or note in writing, sufficient under the 3rd clause of the Statute of Frauds.

Where the surrender relied upon, is one produced by act and operation of law, it must be so pleaded.

A defendant in an action of tres-5 U. C. Q. B. pass, failing to prove the surrender stances, the sale of the north half of of a term of years from the plaintiff to himself, upon an issue arising out of a plea of liberum tenementum, may nevertheless consistently hold a general verdict upon another issue, denying the close to be the close of the plaintiff .- McNeil v. Train, 91.

TAXES.

Sale of land for Taxes. Return of Treasurer. Surveyor-General. The Distress.] Surveyor-General made a return to the treasurer of the District. headed "Township of Dorchester, southern division, broken front concessions A. and B., south part to John Reilly, jr., 100 acres, north part to Dudley McPhee, 200." Thus returning the 200 acres as the north part of broken front concession A. and B. treating it as one tract, and not distinguishing how much was in concession A., and how much in B. treasurer did not open his account in accordance with the Surveyor-General's return, charging the assessment against "the north part of 22, in broken front concession A. and B., 200 acres, but of his own accord opened a separate account against north half lot 22, in broken front B., 100 acres," and returned it as in arrear for taxes, upon which return it was sold. It was admitted that if the assessment had been charged against the two hundred acres as returned by the Surveyor-General, there had been always ample distress upon the premises, and it was proved at the trial, that the parties who had paid taxes on the lot having a title to the whole lot of 200 acres, had paid taxes on the whole 200 acres, and not separately on any part of it. Held, per Gur., that under these circum- riff's sale is prima facie good, when

lot 22 in broken front B., 100 acres, was illegal and void, on two grounds: 1st, because it appeared, that notwithstanding the return made by the treasurer, there was no arrear in fact of taxes subjecting the land to sale; and 2ndly, because at the time of the sale, there was a sufficient distress on the premises .-Doe Upper v. Edwards, 594.

TITLE.

Heir at Law conveying. Third farty in adverse possession.] deed made by the heir-at-law, while a third party is in possession, claiming adversely, is void. heir-at-law must gain possession before he can convey .- Doe Peterson v. Cronk, 135.

Bargain and sale. Possession by third party at the time of deed given.] Where at the time a deed of bargain and sale is made to A., B. is openly in actual possession of the land, using it as his own, nothing passess under the deed to A. -Doe Bonter v. Savage, 223.

Statute of Maintenance. Heir at law conveying to a party out of possession. Mortgage.] Where A., in the actual possession of land as owner, claiming the fee, gives a mortgage to B., who assigns to the lessor of the plaintiff-a deed given by the heir at law of a former owner to the defendant while out of possession, and subsequent to the mortgage, is void, as against the common law and the Statute of Maintenance. -Doe Moffatt v. Scratch, 351.

Purchaser's Title under Sheriff's sale. Irregular proceedings anterior to the judgment.] The purchaser's title to land under a shethe sale is made upon a legal writ, verbal or tacit understanding of both and a defendant seeking to defeat parties as to the real ownership the sale on the ground of any defect might have been .- Doe Quinsey v. in proceedings anterior to the writ, must shew clearly and conclusively that there are those defects.

't he title of a purchaser at sheriff's sale is not liable to be defeated by irregularities in the proceedings anterior to the judgment. So long as the judgment subsists in full force, it supports the execution, and the execution supports the sale .-Doe Boulton v. Fergussom 515

Deed revoking devise.] A. devised to B., his son, "a certain parcel of land, not less than sixty acres, nor to exceed one hundred; bounded above the road by Mr. Mason's west line, and to extend No. 24 west until he intersects with John Marsh." Which description not being sufficiently precise to mark out any certain piece of land, he made a deed some years afterwards, by which, for a consideration of 50%, he bargained and sold to B. eighty acres of the said lots of land, under a description which did make out a certain tract, and which would include at least sixty acres of that which had been devised to B.; Held, per Cur., that the deed was a revocation of the devise to B., who could hold only such land as the deed covered .-Doe Marsh v. Scarborough, 499.

Statute of Limitations. Possession. Father and Son. Where a son has been allowed by his father to remain in possession of land for twenty years, and it cannot be shown that he was there as the servant or agent of the father, or had paid rent within the twenty years, or had acknowledged his title in writing, the father will lose his title, no matter what the

Joseph Canniffe, 602.

TOLLS.

Port Credit Harbour Tolls. \ Under the statute, 4 Wm. IV. ch. 32, s. 5, parties receiving benefit from the Port Credit Harbour in its present unfinished state, must pay the tolls prescribed .- Port Credit Harbour Company v. Jones et al. 144.

TOWN OF LONDON.

Corporation Act.] Held, per Cur., that under the statute 10 & 11 Vic. ch. 48, the corporation of the town of London are the sole judges of the return and qualifications of candidates for seats in the common council, and that their decision is final .-In re Balkwell, 624.

See also "Statutes."

TRESPASS.

Purchaser of Property sold for Rent liable in Trespass, when.] He will be a trespasser who purchases property sold for rent on the 15th of February, and does not enter to remove it from off the premises on the 26th March following.-Alway v. Anderson, 34.

Trespass. Plea. Close not Plaintiff's. Evidence required. Possession. To support an action of trespass, upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the locus in quo.

Under the plea of the close not being the close of the plaintiff, the question of possession is a fact for the jury .- McNeil v. Train, 91.

The occupier of land without title, -to what land he will be limited when suing in. Pleadings.] Where there is no actual title or claim of title, the occupant is not deemed by construction of law to be in possession of more land than his occupation covers, and to this occupation, when suing in trespass, he will be strictly limited.

To an action of trespass, the defendant pleaded: 1st, not guilty; 2nd, close not plaintiff's; 3rd, plaintiff not possessed; *Held, per Cur.*, that an award could not be given in evidence by the defendant under any of these pleas.—Lake v. Briley, 136.

Exclusive Possession necessary to maintain Action of.] A party obtaining from the crown agent a license to enter upon certain land, and to cut such a quantity of timber of particular dimensions as he might require, not having, by such license, the exclusive possession of the land, cannot maintain trespass.—McLaren v. Rice, 151.

Pleadings—when charged with committing a.] A person who is charged in the declaration with causing another to be imprisoned, laying the act with force and arms, is charged with committing a trespass.—Fergusson v. Adams, 194.

What Possession sufficient to maintain Trespass.] Where A. has once given peaceable possession of land to B., A. by re-entry without B.'s consent, cannot acquire a possession such as will entitle him to bring an action of trespass against B.—McNeil v. Train, 91.

Full costs.] Where to an action of trespass quare clausum fregit, the defendant pleaded that the close was not the close of the plaintiff, and the plaintiff had a verdict, is. damages; Held, per Cur., that the plaintiff,

under the statute 22 Car. II., ch. 9 though he had not obtained from the judge at the trial a certificate, that the title of the land came in question, was nevertheless entitled to full costs.—Lake v. Briley, 307.

What amounts to exclusive possession sufficient to maintain.] In an action of trespass qu. cl. fr., where the possession was disputed, the defendant proved that the plaintiff's brother was in possession of the close, to work it for him, the plaintiff, on shares; Held, per Cur., that this agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession.—Dacksteder v. Baird, 591.

TROVER.

Donatio mortis causa. Administratrix. Right of Possession.] A. makes an agreement with B. to work a mill on shares. A., who owned the mill. to have two-thirds, and B., who worked it, one-third of the toll. After some years B. is taken dangerously ill, and about an hour before his death, sends for A., and tells himhaving first requested those about him to leave the room-that there is about 300 bushels of toll-wheat in the mill, undivided, 100 of which, under the agreement, would be his, B.'s; that as he, B., owed him, A., for money lent, he begged he would accept the other 100 bushels, and also a promissory note, which he sent for and handed him. Witnesses, who overheard part of the conversation, swore to the 100 bushels and the note being given by B., not as a gift, but, as they heard B. say, in payment of a past debt.

Held, per Cur., in an action of

trover, brought by B.'s administratrix to recover from A. the wheat and note, that upon these facts the question of delivery as upon a "donatio mortis causa" did not arise, the transaction being nothing more than an ordinary sale, for a valuable consideration; that if it had, the wheat being already in A.'s own mill, no further delivery could be required.

Held, also, that the agreement, being personal between A. and B., the intestate, having no term in the mill, his administratrix had no right of possession, and could not support the action.—Ralph, Administratrix. v. Link, 145.

USE AND OCCUPATION.

When occupation under a third party. Nonsuit.] In an action for use and occupation, where it is quite evident that the defendant did not occupy under the plaintiff, or with his permission, either express or implied, but under a third party; the plaintiff will be non-suited. — McDonald v. Brennan, 599.

VARIANCE.

Guarantee. Nonsuit.] Where a plaintiff charged the defendant as upon a guarantee to pay a certain judgment which he set out in specific terms, and he afterwards proved at the trial, not this special guarantee, but a guarantee extending to all claims, and he was nonsuited for a variance; Held, per Cur., nonsuit right.—Sutherland et al. v. McCaskill, 317.

WARRANT.

Warrant without seal not void.] Semble, that a warrant having no seal does not make it invalid.—Fraser v. Dickson, 331.

WILL.

Interest taken by Executors under Right of Distress.] A testator by his will desires that his executors shall sell and dispose of his land, and then "nominates and appoints his executors, their executors and administrators, to seal, execute and deliver any deeds that may be necessary for making a title to the purchaser; Held, per Cur., that this devise vested no interest in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold.—Nicoll v. Cotter, 564.

Revocation of, by Deed,] A. devised to B. his son a certain parcel of land, not less than 60 acres nor to exceed 100, bounded above the road by Mr. Mason's west line, and to extend No. 24 west until he intersects with John Marsh, which description not being sufficiently precise to mark out any certain piece of land, he made a deed some years afterwards. by which, for a consideration of £50 he bargained and sold to B. 80 acres of the same lots of land, under a description which did mark out a certain tract, and which would include at least 60 acres of that which had been devised to B.: Held, per Cur., that the deed was a revocation of the devise to B., who could only hold such land as the deed covered. Doe Marsh v. Scarboro, 499.

WITNESS.

Witness in Ejectment. Incompetency. Connection with Premises.] Before a witness in ejectment should be rejected as incompetent, the precise connection of the witness with the premises claimed in the action should be shewn.—Doe Vernon v. Wetherall, 342.

Attorney, Witness to Bonds answerable for Gosts. Payment of Costs into Court. In an action upon a bond. the attorney for the plaintiff, who was the subscribing witness to the bond, was called to prove its execution. His evidence was objected to by the defendant, on the ground that he had become answerable for costs. To obviate this difficulty, the attorney paid into court a sufficient sum to cover the costs, and was then allowed to be examined: Held, per Cur., on an application for a new trial, that the evidence of the attorney, after paying the money into court, was properly received.-Cuvillier et at. v. Thibodo, 328.

Necessity of producing Subscribing Witness to Note at Trial.] The defendant was sued as maker of a note indorsed to the plaintiff. There was a subscribing witness to the note, who was not produced at the trial, and no objection was taken on that ground. But as the defendant had before the endorsement admitted to the plaintiff, that he had made the note and induced the plaintiff to take it; Held, per Cur., that it was not necessary to prove the note by the subscribing witness, as the defendant could not be allowed to dispute his signature.—Perry v. Lawless, 514.

Time to object to Competency of, at Trial.] A plaintiff allowing the defendant's witness to be examined and cross examined, cannot afterwards object to his competency upon grounds known to the plaintiff and the court before the witness came into the box.—Prescott v. Jarvis 489.

Surveyor of Customs, a Competent. I Under the Imperial Act, 8 and 9 Vic. ch. 93, sec. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty; he cannot therefore be rejected as an incompetent witness upon a case of information for a penalty for harbouring smuggled goods.—Attorney-General v. Warner, 485.

Three Witnesses to a Deed, two Dead, third Witness must be accounted for.] A. B. and C. are witnesses to a deed; A. having been shewn to be dead, his handwriting is proved; the handwriting of B., who is also the lessor of the plaintiff in the action of ejectment, is also proved. D., the defendant in the action of ejectment, having proved B,'s handwriting, rests his proof of the deed there, without attempting to account in any way for C., the third witness. Semble, per Jones, J., that the deed, without accounting for the absence of the witness C., was not legally proved. -Doe McDonald v. Twigg, 167.

Memorials and Letters more than Thirty Years old.] A memorial more than thirty years old, of a lost deed, is good evidence, upon its bare production, without calling or accounting for the subscribing witnesses. Semble, that this principle extends to any written document more than thirty years old, even to letters.—Doe Maclem v. Turnbull, 129,











